EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(8)

No. 86-328-CFX
Status: GRANTED

Title: Champion International Corporation, Petitioner
v.
International Woodworkers of America, AFL-CIO-CLC

Docketed:
August 29, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
86-322

See also:

Counsel for petitioner: McKee, Miles Curtiss,

Counsel for respondent: Youngdahl, James E.

Entry	Date	Note	Proceedings and Orders
1	Aug 29 1986	G	Petition for writ of certiorari filed.
3	Sep 22 1986		Order extending time to file response to petition until November 2, 1986.
4	Oct 31 1986		Brief amicus curiae of NAACP Legal Defense and Educ. filed.
5	Oct 31 1986		Brief of respondents Intl. Woodworkers of America, et al. in opposition filed.
6	Nov 12 1986		DISTRIBUTED. November 26, 1986
7	Dec 1 1986		Petition GRANTED. The case is consolidated with 86-322, and a total of one hour is allotted for oral argument.
			**********
8	Dec 11 1986	G	Motion of petitioners to dispense with printing the joint appendix filed.
9	Jan 12 1987		Motion of petitioners to dispense with printing the joint appendix GRANTED.
10	Jan 14 1987		Brief of petitioner Champion Intl. Corp. filed.
11	Jan 28 1987	G	Motion of respondents for divided argument filed.
12	Jan 31 1987	G	Motion of petitioners for divided argument filed.
13	Feb 10 1987		Record filed.
14	Feb 10 1987		Certified copy of original record and proceedings, 2 volumes, received.
15	Feb 17 1987		Brief of respondents Intl. Woodworkers of America, et al. filed.
18	Feb 23 1987		Motion of respondents for divided argument GRANTED.
19	Feb 23 1987		Motion of petitioners for divided argument GRANTED.
20	Feb 19 1987		Brief amicus curiae of NAACP Legal Defense and Educational Fund, et al. filed.
21	Mar 13 1987		CIRCULATED.
22	Mar 11 1987		SET FOR ARGUMENT. Wednesday, April 29, 1987. This case is consolidated with No. 86-322. (2nd case) (1 hour).
23	Apr 21 1987	X	Reply brief of petitioner Champion Intl. Corp. filed.

86-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MILES CURTISS MCKEE
JEFFREY A. WALKER

FUSELIER, OTT, MCKEE & WALKER, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

(601) 948-2226

Counsel for Petitioner

QUESTION PRESENTED

Whether in non-diversity cases federal courts may tax as costs the fees of expert witnesses in excess of the amount set forth in 28 U.S.C. § 1821.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are Champion International Corporation and the International Woodworkers of America, AFL-CIO-CLC.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	7
Appendix A (Opinion of the Court of Appeals on Rehearing En Banc)	A-1
Appendix B (Opinion of the Court of Appeals)	B-1
Appendix C (Opinion of the District Court)	C-1
Appendix D (Opinion of the District Court's Magistrate)	D-1

TABLE OF AUTHORITIES

	Page(s)
CleveRock Energy Corp. v. Trepel, 609 F.2d 1358 (10th Cir. 1979)	5
Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964)	5
Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway, 284 U.S. 444 (1932)	5
Lewis v. N.L.R.B., 750 F.2d 1266 (5th Cir. 1985)	5
Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519 (11th Cir. 1985)	5
Murphy v. Operating Engineers Local 18, 774 F.2d 114 (6th Cir. 1985)	5
Northcross v. Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980)	5
Paschall v. Kansas City Star Co., 695 F.2d 322 (8th Cir. 1982), *rev'd on other grounds en banc,* 727 F.2d 692 (8th Cir.), *cert. denied,* 105 S.Ct. 222 (1984)	4
Quy v. Air America, Inc., 667 F.2d 1059 (D.C. Cir. 1981)	4
Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201 (3d Cir. 1981)	4
Shakey's, Inc. v. Covalt, 704 F.2d 426 (9th Cir. 1983)	4
Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240 (9th Cir. 1982), *vacated on other grounds,* 461 U.S. 952 (1983)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Champion International Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Appendix A, *infra*) is reported at 790 F.2d 1174 (5th Cir. 1986) (en banc). The panel opinion of the court of appeals (Appendix B, *infra*) is reported at 752 F.2d 163 (5th Cir. 1985) (per curiam). The unreported opinion of the district court is reproduced in Appendix C, *infra*. The unreported opinion of the district court's magistrate is reproduced in Appendix D, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1821(b) provides:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

STATEMENT

A. Facts

The International Woodworkers of America, AFL-CIO-CLC ("IWA"), and one of its local unions filed a class action against Champion International Corporation ("Champion") alleging violations of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Three Champion employees subsequently were allowed to intervene as plaintiffs and ultimately were certified as class representatives.

After a trial, which centered upon testimony offered by an expert witness hired by Champion, the district court entered an opinion on the merits dismissing the claims of the IWA, all other plaintiffs and the class. *Woodworkers v. Champion International Corp.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,287 (N.D. Miss. 1982), *aff'd*, 732 F.2d 939 (5th Cir. 1984) (per curiam). A judgment was entered the same day assessing all costs against the IWA.

Champion thereafter filed a bill of costs, which included a request for expert witness fees, and a motion for allowance of the company's attorneys' fees as a part of the costs of the case. The district court denied Champion's motion for attorneys' fees. All other costs questions, including the request for the expert witness fees, were referred to a magistrate.

B. The Decisions of the District Court

In light of substantial local district authority approving the practice in some circumstances, the magistrate taxed the IWA with a portion of Champion's expert witness fees. The IWA appealed the magistrate's decision to the district judge.

The district judge reversed the magistrate's holding and, instead, followed what he believed to be the "normal civil litigation rule [that] disallows excess fees for expert witnesses." More specifically, the district judge construed existing Fifth Circuit decisions as precluding the taxing of expert witness costs to the prevailing party, except in cases where the losing litigant had proceeded in bad faith or where the prevailing party is a civil rights plaintiff. The local district authority relied upon by the magistrate was expressly overruled.

C. The Decisions of the Court of Appeals

A panel of the court of appeals affirmed the district judge's decision that prevailing defendants in non-frivolous civil rights actions may recover expert witness costs only under standards established by this Court's attorneys' fees decisions in civil rights cases. The panel further held that an indispensable-to-the-case standard for taxing expert witness costs found in some Fifth Circuit decisions should not be extended to civil rights cases.

On rehearing en banc, the court of appeals rejected the theories of the magistrate, the district judge and the panel, and held that, absent bad faith or a statute expressly authorizing such an award, no federal non-diversity litigant may recover expert witness costs in excess of the amount provided for in 28 U.S.C. § 1821. Rule 54(d) of the Federal Rules of Civil Procedure was construed as providing discretion only to disallow expenses otherwise expressly provided by statute rather than as a procedural acknowledgement of district courts' inherent equitable power to allow expenses. The court of appeals expressly overruled its previous decisions purporting to recognize exceptions for prevailing civil rights plaintiffs and in those instances where the expert witness was indispensable to a proper determination of the case.

REASONS FOR GRANTING THE WRIT

A. The Decisions of the Courts of Appeals As to the Standards for Recovering Expert Witness Costs Are in Irreconcilable Conflict.

The relatively straightforward question of whether and under what standards expert witness costs may be recovered by non-diversity federal litigants has been answered differently by nearly every court of appeals. Judge Rubin, concurring in the en banc result in this case but dissenting from the underlying rationale of the court of appeals' majority opinion, complained that the new Fifth Circuit "rule" added a fourth line to the existing three lines of conflicting circuit decisions.

The Third Circuit, Eighth Circuit, Ninth Circuit and District of Columbia Circuit have all embraced, at one time or another and in one form or another, an important-to-the-case standard. *Shakey's, Inc. v. Covalt,* 704 F.2d 426, 437 (9th Cir. 1983); *Paschall v. Kansas City Star Co.,* 695 F.2d 322, 338-39 (8th Cir. 1982), *rev'd on other grounds en banc,* 727 F.2d 692 (8th Cir.), *cert. denied,* 105 S.Ct. 222 (1984); *Quy v. Air America, Inc.,* 667 F.2d 1059, 1066 & n.12 (D.C. Cir. 1981); *Roberts v. S.S. Kyriakoula D. Lemos,* 651 F.2d 201, 204-07 (3d Cir. 1981). Rule 54(d) is the most common source authority for these holdings.

The Tenth Circuit, Eleventh Circuit and, with the decision in the instant case, the Fifth Circuit flatly refuse recovery in all federal-question cases. *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1526 (11th Cir. 1985); *CleveRock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979). In many circuits, cases may be found to support the proposition that expert witness fees are taxable only as a part of out-of-pocket fees and expenses of attorneys. *E.g., Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983). The Sixth Circuit, however, has reached precisely the opposite conclusion. *Northcross v. Memphis City Schools*, 611 F.2d 624, 639-40 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).[1]

B. The Court of Appeals Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Much of the confusion among the decisions of the courts of appeals probably emanates from the fact that two decisions of this Court arguably support all of the positions adopted by the circuits. *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway*, 284 U.S. 444 (1932), typically is cited for the proposition that expert witness costs are limited to the amounts set forth in 28 U.S.C. § 1821. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), generally supports arguments that Rule 54(d) provides sufficiently broad discretion for district courts to tax expert witness fees as costs. A reasonably candid reading of both cases, however, can result only in the conclusion that this Court has never directly addressed the issue.

Expert witnesses are a fact of life in modern federal litigation. Some courts have even gone so far as to encourage parties to present certain forms of evidence through expert witnesses. *See, e.g., Lewis v. N.L.R.B.*, 750 F.2d 1266, 1274 n.12 (5th Cir. 1985) (statistical evidence in employment discrimination actions). Yet, despite the everyday importance of expert witnesses in federal trial courts, neither judges nor

[1] The Sixth Circuit has recognized that its decisions on the issue are in hopeless conflict. Murphy v. Operating Engineers Local 18, 774 F.2d 114, 133-34 (6th Cir. 1985).

litigants have available to them a definitive decision or series of decisions from which they might determine, within any reasonable degree of confidence, whether the expert witness costs in any particular case might qualify as taxable costs.

Again, Judge Rubin's concurrence and dissent in the instant case is helpful in understanding the breadth of the problem.

> The costs of litigation, as we all know, have become staggering. A plaintiff may put a defendant or a defendant may put a plaintiff to a tremendous amount of expense, apart from the cost of obtaining an attorney's services, in defending or prosecuting a case. One cause of this expense is the unavoidable necessity of expert witness testimony to establish or rebut many legal claims, especially those raised in civil rights and antitrust cases. A study cited by a student writer suggests that expert testimony controls the outcome in two-thirds of all cases, and that expert witness fees are second only to attorney's fees as the largest litigation expense.

Few questions are presented to this Court which have as wideranging practical interest and impact as the issues raised in the instant case. All judges, all lawyers and all litigants in the federal courts would be well served by a decision from this Court on the question presented.

CONCLUSION

Champion submits that district courts possess discretion to award expert witness costs to the prevailing party in non-diversity cases. Therefore, Champion respectfully requests that the Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHAMPION INTERNATIONAL CORPORATION, *Petitioner*

MILES CURTISS MCKEE
JEFFREY A. WALKER
DONALD W. MALINIAK

BY: MILES CURTIS MCKEE

FUSELIER, OTT, MCKEE & WALKER, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

(601) 948-2226

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing petition have been served on all parties required to be served by first class United States mail, postage prepaid, this the 29th day of August, 1986, at the following address: James E. Youngdahl, Esq., Youngdahl & Youngdahl, P.A., P.O. Box 6030, Little Rock, Arkansas, 72216.

JEFFREY A. WALKER

JEFFREY A. WALKER
FUSELIER, OTT, MCKEE & WALKER, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226

APPENDIX A

No. 83-4616.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

June 2, 1986

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO AND ITS LOCAL NO. 5-376,
Plaintiff-Appellee,

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellant.

Jeffrey A. Walker, Fuselier, Ott & McKee, M. Curtiss McKee, Jackson, Miss., for defendant-appellant.

Michael B. Trister, Richard B. Sobol, Washington, D.C., for amicus curiae, The Pay Discrimination Institute.

Steven L. Winter, New York City, for amicus-N.A.A.C.P.

James E. Youngdahl, Youngdahl, Larrison & Agee, Little Rock, Ark., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

Before CLARK, Chief Judge, and WISDOM, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.*

RANDALL, Circuit Judge:

Section 1920 of Title 28 allows the fees of witnesses to be taxed as costs in federal court, while section 1821 of the same

---

* Due to his death on March 27, 1986; Judge Albert Tate, Jr. did not participate in this decision.

title establishes the amount that may be so taxed. The case before us today asks whether—and if so, when—federal courts in non-diversity cases may tax as costs the fees of non-court appointed expert witnesses in excess of the amount set forth in 28 U.S.C. § 1821. We hold that the fees of non-court-appointed expert witnesses are taxable only in the amount specified by § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of three narrow equitable exceptions to the American Rule applies. Our holding overrules those portions of *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.) (en banc), *cert. dismissed*, 453, U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982) (*Copper Liquor III*), *modified on other grounds en banc*, 701 F.2d 542 (5th Cir. 1983), and their progeny approving the taxing of excess expert witness' fees as costs under standards different from that here announced.

I.

International Woodworkers of America, AFL-CIO, CLC ("IWA") and one of its local unions sued Champion International Corporation ("Champion") alleging racial discrimination in employment in violation of Title VII and 42 U.S.C. § 1981. After a trial, the district court entered judgment on the merits dismissing the claims of all plaintiffs and assessing costs against IWA. We affirmed the district court's judgment on the merits.

After denying Champion's motion for attorneys' fees, the district judge referred all other cost questions to a magistrate. The magistrate awarded Champion $14,750.87 in costs, of which $11,807.16 were for a portion of the services of an expert witness employed by Champion for the statistical aspects of the case. IWA objected to certain parts of the award, particularly to the taxing of the expert witness' fees in an amount exceeding that provided for by § 1821, and the case returned to the district judge.

The district judge sustained IWA's objections to the taxing of the excess expert witness' fees, concluding that this court in

Jones v. Diamond had adopted for the purpose of defendants' excess expert witness' fees the *Christiansburg* standard set forth by the Supreme Court governing attorneys' fees.[1] Because IWA's suit did not meet that standard, the district court refused to grant Champion expert witness' fees in excess of the amount provided by § 1821.

On appeal, a panel of this court affirmed, 752 F.2d 163 (5th Cir. 1985), rejecting Champion's argument that *Copper Liquor III* authorized excess expert witness' fees to a prevailing defendant if the "expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case." The district court's finding that IWA-Champion litigation failed to meet the *Christiansburg* standard remained unchallenged on appeal; the panel thus declined to reach the applicability of that standard. This court voted to rehear the case en banc, thereby vacating the panel opinion. *See* Fifth Circuit Local Rule 41.3.

II.

In the United States, contrary to the English practice, a rule of limited recovery of the expenses of litigation has developed to discourage costly litigation and guarantee access to the courts. *See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967). The "American Rule" draws a distinction between expenditures incurred by order of the court to facilitate consideration of the case, and expenditures incurred merely to aid one party in the presentation of his side. *See Ex Parte Peterson*, 253 U.S. 300, 316, 40 S.Ct. 543, 548, 64 L.Ed. 919 (1920). The former, in times past referred to as costs "between party and party," and now known as taxable costs, are recoverable by the prevailing party under the American Rule; the latter, denominated costs "as between solicitor and client" and including such items as attorneys' fees and "other expenses entailed by the

[1] In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), the Supreme Court held that prevailing civil rights defendants are entitled to attorneys' fees only when the lawsuit is frivolous, unreasonable, or without foundation.

litigation not included in the ordinary taxable costs recognized by statute," *see Sprague v. Ticonic National Bank,* 307 U.S. 161, 164, 59 S. Ct. 777, 778, 83 L.Ed. 1184 (1939), such as expert witness' fees in excess of the amount provided for by statute, are generally borne by the litigants.

Before the merger of law and equity, courts at law awarded to the prevailing party costs "between party and party" as a matter of course. Courts sitting in equity had discretion to award such costs, or a portion thereof, as justice might demand. Federal courts sitting in equity also had limited discretion to award costs "as between solicitor and client" in certain exceptional cases. These exceptions to the American Rule were nearly identical to those recognized by the English High Court of Chancery: the "foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague,* 307 U.S. at 166, 59 S.Ct. at 780. The exceptions were limited to cases involving preservation of a common fund, vexatious or oppressive prosecution of a claim or maintenance of a defense, *Hall v. Cole,* 412 U.S. 1, 5-6, 93 S.Ct. 1943, 1946-1947, 36 L.Ed.2d 702 (1972), or wilful disobedience of a court order. *Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399, 426-28, 43 S.Ct. 458, 465-66, 67 L.Ed. 719 (1923). Absent statute or equitable exception, however, under the American Rule litigants paid their own costs "as between solicitor and client."

In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975), the Supreme Court decided against fashioning a far-reaching exception to the American Rule for attorneys' fees, determining instead that it would be "inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation. . . ." The Court reasoned that 28 U.S.C. § 1920(5) and § 1923 controlled the amount that might be awarded as attorneys' fees. The Court examined the congressional intent behind the statutory predecessor of § 1920 and § 1923: the Fee Bill of 1853. In enacting the 1853 Act, Congress undertook to standardize and limit the costs allowable in federal litigation.

Alyeska, 421 U.S. at 251-52, 95 S.Ct. at 1618-19. The 1853 Act did not permit courts to "tax against the losing party 'solicitor and client' costs in excess of the amounts prescribed" therein. *Id.* at 258 n. 30, 95 S.Ct. at 1621 n. 30. True to the American Rule, the Court concluded that "absent statute or enforceable contract, litigants pay their own attorneys' fees." *Id.* at 257, 95 S.Ct. at 1621. Despite its decision not to carve a broad exception to the American Rule, the Court nevertheless recognized the three judicially fashioned equitable exceptions which, as the Court noted, have not been repudiated by Congress. *Id.* at 260, 95 S.Ct. at 1623. A Federal court might award reasonable attorneys' fees to the prevailing party in excess of the small sums permitted by § 1923 when: (1) the trustee of a fund or property, or a party in interest, preserved or recovered the fund for the benefit of others in addition to himself; (2) a party acted in wilful disobedience of a court order; or (3) the lsoing party had acted in bad faith, vexatiously, wantonly, or for oppressive reasons.[2]

The American Rule of limited recovery, although most often discussed in the context of attorneys' fees, is equally applicable in the context of excess expert witness' fees. Like the statutory provisions before the *Alyeska* Court, those before us today find their origins in the Fee Bill of 1853. Section 1920 states that the court may tax as "costs" the fees of witnesses.[3]

---

[2] The last exception is consistent with our decision in *Kinnear-Weed Corp. v. Humble Oil & Refining, Co.*, 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941, 92 S.C. 285, 30 L.Ed.2d 255 (1971), in which we held that attorneys' fees and excess expert witness' fees were taxable against a party acting in bad faith.

The Supreme Court has recently reaffirmed the limited nature of the exceptions to the American Rule, noting that most of the exceptions to the rule are statutory. *Marek v. Chesney*, ____ U.S. ____, ____, 105 S.Ct. 3012, 3016, 87 L.Ed.2d 1 (1985). *See also Webb v. Board of Education of Dyer County*, ____ U.S. ____, ____ n. 1, 105 S.Ct. 1923, 1930 n. 85 L.Ed.2d 233 (1985) (Brennan, J., dissenting) (referring to the exceptions as "several narrow exceptions").

[3] Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;

(footnote continues)

Section 1821 establishes the maximum amount that may be allowed for witnesses' attendance fees.[4] These sections represent Congress' treatment of the taxing of witness fees as costs. Courts cannot, in the absence of other explicit statutory authority or one of the three limited equitable exceptions recognized in *Alyeska,* tax as costs expert witness' fees in excess of the amount set forth in § 1821. Moreover, because the taxing of witness' fees as costs has been expressly provided for by federal statute, federal courts cannot tax excess fees as costs under Fed.R.Civ.P. 54(d), which provides for court discretion to tax costs "[*e*]*xcept* where express provision therefor is made either in a statute of the United States or in these rules" (emphasis added).[5]

(footnote continued)

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[4] Section 1821 provides in relevant part:

(b) A witness shall be paid in attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

This section draws no distinction between ordinary and expert witnesses, and it—or, more precisely, its statutory predecessor—has been held to apply to both categories of witnesses alike. *See Henkel v. Chicago, St. P., M. and O. Rwy.*, 284 U.S. 444, 52 S.Ct. 223, 76 L.Ed. 386 (1932).

[5] Federal Rule of Civil Procedure 54(d) provides in pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." The Rule embodies the notion applicable to all civil actions after the merger of law and equity that, except as otherwise expressly provided by statute or rule, costs should be

(footnote continues)

Our ruling is commanded by the Supreme Court's holding in *Henkel v. Chicago, St. P., M. and O. Rwy.*, 284 U.S. 444, 52 S.Ct. 223, 76 L.Ed. 386 (1932). Citing a statutory predecessor to § 1920 and § 1821, the Court found that because federal law made express provision for the amount payable and taxable as witness' fees, "additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts." *Id.* at 446, 52 S.Ct. at 225. The Court further observed that "Congress has dealt with the subject [of witness' fees] comprehensively and has made no exception of the fees of expert witnesses." *Id.* at 447, 52 S.Ct. at 225. Although *Henkel* was a case decided "at law," the subsequent merger of law and equity effected by the adoption of the Federal Rules of Civil Procedure does not alter the result in *Henkel* in view of the specific language in Fed.R.Civ.P. 54(d) dealing with costs which are covered by express federal statutes.

The Court's reasoning in *Alyeska* in the analogous area of attorneys' fees further compels our conclusion that expert witness' fees are generally not recoverable beyond the amount specified by statute. As noted above, like the provisions before the *Alyeska* court, those before us today are statutory heirs of the Fee Bill of 1853. The congressional intent found relevant by the Supreme Court in *Alyeska* also governs here. The 1853 Act "specif[ied] in detail the nature and amount of the taxable items of costs in the federal courts." *Alyeska*, 421 U.S. at 252, 95 S.Ct. at 1619. The Act did not permit the taxing of excess "solicitor and client" costs. *Id.* at 258 n. 30, 95 S.Ct. at 1621 n. 30. Congress has not since "retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors." *Id.* at 260, 95 S.Ct. at 1623. Just as Congress in the Fee Bill of 1853 extended no "roving authority to the Judiciary

---

(footnote continued)

'allowed as of course to the prevailing party. A federal court in its discretion could direct that certain costs, otherwise allowed as a matter of course, not be allowed.

That Rule 54(d) cannot be used to circumvent the limits on costs set forth in § 1920 and § 1821 was recognized by the drafters of the Rule. The Advisory Committee's Notes to Rule 54(d) emphasized that the terms of the statutory predecessor of § 1920 remained "unaffected by the rule."

to allow counsel fees as costs or otherwise whenever the courts might deem them warranted," *id.*, so too Congress extended no "roving authority" to allow expert witness' fees in excess of the amount specifically provided for by statute.[6]

Further, numerous statutes expressly allow federal courts to award the full amount of expert witness' fees as costs of litigation.[7] Given Congress' ability to provide explicitly for the taxing of excess expert witness' fees as costs, we should not infer congressional intent to award such costs in the absence of an express statute so providing. Moreover, a statute which provides only for an award of "costs" or "attorneys' fees" but which fails to address expert witness' fees will not be construed to authorize the taxing of expert witness' fees in excess of the § 1821 amount.

---

[6] Section 1920(6) allows the court to tax as costs the compensation of court-appointed experts. Our holding today recognizes that § 1920(6) acts in effect as a safety-valve, permitting the full compensation of court-appointed expert witnesses to be taxed as costs after notice and an opportunity to object to their appointment by the court.

[7] At least twenty-eight statutes provide for the taxing of expert witness' fees as costs in civil actions, albeit under varying standards: (1) Consumer Product Safety Act, 15 U.S.C. §§ 2060(c) (action for review of consumer product safety rule), 2072(a) (action by person injured by one in knowing violation of consumer product safety rule), 2073 (action for enforcement of consumer product safety rule); (2) Toxic Substances Control Act, 15 U.S.C. §§ 2618(d) (action for review of rule regulating toxic substances), 2619(c)(2) (citizen's action to compel compliance with regulations, controlling toxic substances), 2620(b)(4)(C) (action to compel initiation of rulemaking proceeding regarding toxic substance); (3) Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(3) (action to enforce provisions governing franchise relationship in petroleum marketing practice); (4) National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4 (action for enforcement of provisions regarding national historic preservation); (5) Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (citizen's action to compel compliance with provisions concerning endangered species); (6) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a)(1) (proceeding involving electric utility); (7) Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii) (action brought by or against United States in connection with determination, collection, or refund of any tax, interest, or penalty under Internal Revenue Code); (8) Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (as amended by Pub.L.

(footnote continues)

The Supreme Court's holding in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964), does not command a rule different from that today announced. *Farmer* presented the Supreme Court with the question whether, in view of Rule 45(e)'s command that witnesses cannot be compelled to travel more than 100 miles, a party who procured their voluntary attendance by paying the witnesses' transportation expenses could have those expenses taxed as costs against a defeated adversary. The Supreme Court held that the trial court did not abuse its discretion under Rule 54(d) in refusing to tax certain items as costs. In dicta, the court explained: "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses *not specifically allowed by statute.*" *Farmer*, 379 U.S. at 235, 85 S.Ct. at 416 (emphasis added). Whatever import this quoted language carries for the assessment of expenses *not specifically allowed by statute*, it is not relevant here, for expert witness' fees have been comprehensively dealt with by Congress in § 1920 and § 1821. In addition, the Court in *Farmer* upheld the exercise of the district court's discretion under Rule 54(d) to *refrain* from taxing certain expenses as costs; to rely on *Farmer* to justify the affirmative taxing of witness' costs in excess of the § 1821 amount would turn *Farmer* on its head.

(footnote continued)

99-80. 99 Stat. 184, 186) (any non-tort civil action brought by or against United States); (9) Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (civil action to compel compliance with provisions governing surface mining and reclamation); (10) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (civil action for equitable relief against person in violation of provisions regulating exploration and commercial recovery by U.S. citizens of deep seabed hard mineral resources); (11) Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4) (state action to recover royalty, interest, or civil penalty with respect to any oil and gas lease on federal lands located within the state); (12) Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d) (action for recovery of compensation under LHWCA); (13) Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (citizen's action against person in violation of water pollution prevention and control provisions); (14) Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (citizen's suit against person in violation of ocean dumping standards); (15) Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d)

(footnote continues)

We overrule those portions of our prior opinions suggesting standards for the taxing of excess expert witness' fees different from that now adopted. In *Jones v. Diamond*, we acknowledged that expert witness' fees were generally recoverable only in the amount prescribed by § 1821, but determined nevertheless that "Congress had manifested an intention that a different rule be applied for civil rights plaintiffs." 636 F.2d at 1382. District courts had "in many instances" awarded "the full fees of experts on the ground that their testimony and assistance were necessary or helpful in representing clients in civil rights litigation." *Id.* As noted by the *Jones* dissent, however, the majority cited no act of Congress to support its decision, but relied only on a single sentence from "a Senate Report concerning legislation which could have contained . . . a provision [authorizing the award of excess expert witness' fees as costs] but *did not*." *Id.* at 1391 (Coleman, C.J., dissenting) (emphasis in original). The single cited sentence in the Senate Report does not authorize the taxing of excess expert witness' fees as costs, and the *Jones* holding on excess expert witness' fees cannot stand in light of the rule announced today.

(footnote continued)

(citizen's action against persons in violation of deepwater port provisions); (16) Act to Prevent Pollution from Ships, 33 U.S.C. § 1910(d) (actions authorized by provisions governing prevention of pollution from ships); (17) Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (action to compel compliance with provisions concerning the safety of public water systems); (18) Noise Control Act of 1972, 42 U.S.C. § 4911(d) (citizen's suit to compel compliance with noise control provisions); (19) Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2) (action for protection of employee of the NRC, an NRC licensee, an applicant for an NRC license, or a contractor or subcontractor of an NRC licensee or applicant); (20) Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (citizen's action to compel compliance with provisions concerning the energy conservation program for consumer products other than automobiles); (21) Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e) (citizen's action to compel compliance with provisions regarding solid waste disposal); (22) Clean Air Act, 42 U.S.C. §§ 7413(b) (action brought by EPA administrator against owner or operator of major stationary source of air pollution in violation of provisions concerning air pollution prevention), 7604(d) (citizen's suit to require compliance with provisions concerning air pollution prevention), 7607(f) (action for review of rules promulgated by EPA administrator concerning air pollution prevention); (23) Clean Air Act Amendments of

(footnote continues)

In *Copper Liquor III,* an antitrust case, we indicated in a part of the opinion entitled "Section 1920 Costs" that trial courts had discretion to award excess expert witness' fees in "exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case." 684 F.2d at 1100 (footnotes omitted). This conclusion that § 1920 authorizes the award of excess expert witness' costs in "exceptional circumstances" is overruled.[8]

(footnote continued)

1977, 42 U.S.C. § 7622(b)(2)(B), (e)(2) (action for protection of employee assisting in proceeding enforcing provisions on air pollution prevention); (24) Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d) (citizen's suit to compel compliance with provisions governing power plant and industrial fuel use); (25) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d) (citizen's action to compel compliance with provisions regarding ocean thermal energy conversion); (26) Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5) (action to compel compliance with provisions governing Outer Continental Shelf leasing program); (27) Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e) (citizen's action against persons in violation of provisions concerning natural gas pipeline safety); (28) Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014(e) (citizen's action against persons in violation of provisions concerning hazardous liquid pipeline safety).

Further, at least three other statutes expressly provide for the taxing of expert witness' fees as costs in administrative proceedings: (1) Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(h)(1) (participation in rulemaking proceedings of Federal Trade Commission regarding unfair or deceptive acts or practices); (2) Toxic Substances Control Act, 15 U.S.C. § 2605(c)(4)(A) (participation in rulemaking proceeding regarding hazardous chemical substances and mixtures); (3) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 825q-1(b)(2) (proceedings before Office of Public Participation).

[8] We also overrule that portion of *Berry v. McLemore,* 670 F.2d 30, 34 (5th Cir.1982), in which we relied on *Jones* to find abuse of discretion in the district court's failure to assess as an item of costs the full fee of an expert witness who was "important" to the plaintiff's § 1983 case. Our holding on excess expert witness' fees in *Greenhaw v. Lubbock County Beverage Ass'n,* 721 F.2d 1019, 1033 (5th Cir.1983), also cannot stand in light of the rule adopted above.

III.

Given the principles set out in Part II of this opinion, we now affirm, albeit on different grounds, the district court's denial of expert witness' fees in excess of the amount provided for in 28 U.S.C. § 1821. The statutes applicable here, 42 U.S.C. § 1988 and § 2000e—5(k), provide for the award of attorneys' fees to prevailing parties, but make no mention of excess expert witness' fees. None of the equitable exceptions to the American Rule is here claimed. Champion thus must content itself with the amount recoverable for expert witnesses under § 1821.

IV.

We hold that the fees of non-court-appointed expert witnesses are taxable by federal courts in non-diversity cases only in the amount specified by § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of the three narrow equitable exceptions recognized by *Alyeska* applies. We direct the district courts in the exercise of our supervisory power to apply the rule announced today to all pending cases.

For the above reasons, the judgment of the district court is AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, concurring in the result in *International Woodworkers of America v. Champion International Corp.*, and dissenting in *J.T. Gibbons, Inc. v. Crawford Fitting Co., et al.***

The majority opinion today fashions a rule that has not been adopted by any other circuit. It applies that rule to the recovery of expert witness fees without considering the recoverability of other litigation expenses. And it applies that rule without distinction to two dissimilar cases in which the recovery of expert witness fees is sought on complete different bases. In *Woodworkers*, a defendant who was the prevailing party in an employment discrimination suit requests expert witness fees as a litigation expense incidental to an award of attorney's fees authorized by The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. In *Gibbons*, the defendant who prevailed in an antitrust suit invokes the court's discretion under Federal Rule of Civil Procedure 54(d) to recover costs, including the fees of expert witnesses for courtroom testimony.

Each of these cases involves a different question. When a statute authorizes an award of attorney's fees to the prevailing party in addition to costs, as in *Woodworkers*, that party should not be denied the right to recover all those expenses for which an attorney would normally bill his client. There is no reason to distinguish, in this respect, between expert witness fees and the myriad other costs incident to litigation that are incurred by a lawyer and billed to his client. While the majority deals expressly only with expert witness fees, the effect of its rationale must inevitably extend to a denial of all other costs of litigation, save reimbursement for the personal services of the lawyer and for those limited costs specified in 28 U.S.C. § 1920.

If, like the victor in *Gibbons*, the prevailing party does not have a statutory right to recover attorney's fees, he may not recover either his lawyer's fees or his lawyer's expenses, but he may request that the district court exercise its discretion under Rule 54(d) to award the costs of litigation, including the fees paid to experts for testifying in court.

** Judges Wisdom, Johnson, and Williams join in Judge Rubin's opinion concurring in the result in *International Woodworkers of America v. Champion International Corp.*, and Judges Goldberg, Johnson, and Williams join in his dissent in No. 84-3332—*J.T. Gibbons, Inc. v. Crawford Fitting Company, et al.*

Neither the court's general discretion to tax costs, nor its determination of which expenses to include in a statutorily authorized award of attorney's fees is, or should be, governed by the standards that define the court's equitable powers to award attorney's fees, as summarized in *Alyeska Pipeline Service Co. v. Wilderness Society.*[1] The application of a single rule to both kinds of cases obliterates the important differences between them and risks overriding Congress' intent in authorizing civil rights attorney's fees.

The majority's rule produces illogical results: Absent a fee-shifting statute, expert witness fees may be recovered when (and only when) attorney's fees would be permitted under the *Alyeska* rule. If, however, Congress has enacted a statute explicitly authorizing the award of attorney's fees in an effort to shift the burden of litigation expenses from the prevailing party to the wrongdoer, expert witness fees are not recoverable even though attorney's fees are.

I.

Both cases before us are affected, although not resolved, by the statutes that govern the taxation of costs in federal courts. 28 U.S.C. § 1920, set forth in full in the footnote,[2] lists certain costs that courts are permitted to tax. Its language is neither

---

[1] 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

[2] 28 U.S.C. § 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

mandatory nor exclusive. It permits the taxing of fees for court-appointed expert witnesses, and the taxing of limited costs for ordinary witnesses, set by 28 U.S.C. § 1821 at thirty dollars per day plus a travel allowance. Section 1920 does not mention fees for expert witnesses except for those appointed by the court. The significance of this omission for the two cases before us depends on a careful review of the questions they present.

The prevailing defendant in *Woodworkers* seeks to recover both attorney's fees and expert witness fees under The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.[3] That statute authorizes the court, "in its discretion," to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *Woodworkers*, therefore, poses a question of statutory interpretation: Did Congress, in enacting § 1988, intend to allow a prevailing party compensation only for fees actually paid to the lawyer himself for legal services rendered, in addition to the routinely recoverable costs listed in § 1920, or did it also intend to allow recovery of the attorney's expenses and other necessary and reasonable costs of litigation?

Gibbons, however, poses a different question. That suit was brought under the Clayton Act, which permits the award of costs and attorney's fees only to a prevailing plaintiff.[4] A victorious defendant may recover costs only by invoking the court's general discretion under Federal Rule of Civil Procedure 54(d). The question presented, therefore, is whether the court's discretion permits the award of expert witness fees, and if so, whether the court abused its discretion in this case.

II.

Section 1988 should be interpreted, I submit, to include within the phrase "attorney's fees as part of the costs" not only fees for a lawyer's services and those costs specified in § 1920, but all of the reasonable expenses of litigation that a privately retained lawyer would usually bill to his client.[5] The Act's

---

[3] 42 U.S.C. § 1988 (1982).

[4] 15 U.S.C. § 15 (1982).

[5] One commentator has suggested that § 1920 should limit the amounts of costs awarded incident to attorney's fees for the basic categories of costs that the statute covers. *See* Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 FRD 553, 595-96 (1984).

legislative history makes clear that an attorney who recovers his fee under § 1988 should receive neither more nor less than an attorney who is paid by his client. This means that office overhead and secretarial expense, normally paid by the attorney out of his fee, whether fixed at a stated amount, or calculated hourly or on some other basis, should not be awarded separately. However, the court should award other reasonable and necessary costs that an attorney incurs and normally bills separately to the client, such as travel costs, long-distance telephone bills, fees paid to consultants, the costs of preparing exhibits, and any other of the multitudinous expenses of litigation.

Expert witness fees are not so singular as to be treated differently from all other litigation expenses. A court's authority to award these expenses comes neither from the equitable powers described in *Alyeska Pipeline Service Co. v. Wilderness Society,*[6] nor from the courts' limited authority under § 1920, nor from its general discretion pursuant to Rule 54(d), but from The Civil Rights Attorney's Fees Awards Act itself, and from Congress' unequivocal statement of the Act's purpose.

Although the statute explicitly refers only to the award of attorney's fees, Congress made clear that attorneys were to be paid "as is traditional with attorneys compensated by a fee-paying client."[7] As the Act's sponsor, Representative Drinan, stated during the House debate, "I should add that *the phrase 'attorney's fee' would include . . . all incidental and necessary expenses incurred in furnishing effective and competent representation.*"[8] These remarks are consistent with the frequent observation that private enforcement of the civil rights laws depend on the citizens' "opportunity to recover what it costs them to vindicate these rights in court."[9] To fulfill its purpose,

---

[6] 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

[7] S.Rep. No. 1011, 9th Cong.2d Sess. 6 (1976), U.S.Code Cong & Admin. News 1976, pp. 5908, 5913.

[8] 122 Cong.Rec., 35,123 (1976) (emphasis added).

[9] S.Rep. No. 1011, 94th Cong.2d Sess. 2 (1976), U.S.Code Cong. & Admin. News 1976, p. 5910; *see also, e.g.,* 122 Cong Rec. 31,471, 33,313 (1976).

the Act necessarily authorized reimbursement for all the resources necessary for "*effective access* to the judicial process." [10] "Congress must insure [that civil rights litigants] have the means to go to court and *to be effective once they get there,*" [11] because "[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement." [12] And, if prevailing plaintiffs or their attorneys must bear the burden of prohibitive expert witness fees, the civil rights laws will be enforced either less frequently or less effectively than Congress intended.

Although *Woodworkers* involves a prevailing civil rights defendant unaffected by these policy considerations, the statute does not distinguish between prevailing parties as to the expenses that are reasonable, and *Christiansburg Garment Co. v. E.E.O.C.* [13] requires that, when the complaint brought proves to be frivolous or unfounded, the defendant must be awarded whatever expenses the plainfiff might have recouped. The rule propounded by the majority today in the case of a prevailing civil rights defendant applies equally to victorious civil rights plaintiffs. Although today's application of the rule affronts no congressional policy, its primary effect in the future will be seen in the financial handicap it imposes on the civil rights plaintiffs that Congress sought to assist.

As the Eleventh Circuit has written in *Dowdell v. City of Apopka, Fla.*:

> Reasonable attorneys' fees under the Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as

---

[10] H.R.Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) (emphasis added).

[11] 122 Cong.Rec. 33,313 (1976) (emphasis added).

[12] S.Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), U.S.Code Cong. & Admin. News 1976, p. 5913. *See also Evans v. Jeff D.*, ____U.S.____, ____, 106 S.Ct. 1531, 1546-1550, 89 L.Ed.2d ____ (1986) (Brennan, J., dissenting).

[13] 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

> essential to success as the intellectual skills of the attorneys. If these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly.
>
> * * *
>
> . . . [I]f the real income of civil rights litigators is decreased because they must absorb costs which are generally billable in other types of cases, the market result will be channel attorneys toward more remunerative types of litigation. Decreasing the supply of attorneys necessarily decreases the access to the courts of victims of civil rights violations.[14]

III.

The linchpin of the majority opinion is its conclusion that expert witness fees are sufficiently analogous to attorney's fees that both should be controlled by the guidelines set out in *Alyeska*. Despite this perceived analogy, the majority denies that Congress might have intended expert witness fees and other out-of-pocket expenses to be included as incidental expenses within an award of attorney's fees or costs. In so holding, the majority takes a path inconsistent with that chosen by every other circuit. It supports this novel result by reasoning that, because Congress has expressly provided for the award of expert witness fees in some statutes, it must therefore have intended to exclude them in all other instances, and by finding that the word "costs" refers only to those limited costs specified in § 1920.

The fact that Congress has expressly mentioned expert witness fees in addition to attorney's fees and costs in more recently adopted expense-shifting statutes does not persuade me that the fee-shifting phrases in the Civil Rights Act, the Clayton Act, and all other earlier enacted statutes were intended to exclude them. Over two-thirds of the statutes cited by

---

[14] 698 F.2d 1181, 1190-91 (11th Cir.1983).

the majority were enacted within the last ten years, and all were enacted within the last fifteen. Consequently, I do not find them determinative of the intent that Congress had when it enacted such statutes as the Clayton Act a hundred years ago, long before expert witness fees became so substantial and common-place as to warrant express reference. Neither should such interpretation by negative implication override the explicit legislative history of a more recently enacted statute, such as the Civil Rights Attorneys' Fees Awards Act.

Circuit courts from every circuit, in cases arising under § 1988, have allowed the prevailing party to recover expert witness fees or other expenses of litigation not enumerated in § 1920, either as costs or as part of attorney's fees.[15]

The First Circuit, in *Palmigiano v. Garrahy,*[16] approved the inclusion of all reasonable and necessary expenses in awards of attorney's fees under § 1988.

The Second Circuit, in *Beazer v. New York City Transit Authority,*[17] awarded the expenses of a pre-trial hearing and trial preparation under § 1988.

The Third Circuit, in *Wehr v. Burroughs,*[18] has awarded LEXIS charges as a reasonable expense of litigation included within an award of attorney's fees.

The Fourth Circuit, in *Wheeler v. Durham City Board of Education,*[19] approved the award of copying, long distance telephone and travel expenses, along with all other out-of-pocket expenditures by a successful civil rights attorney.

---

[15] *See generally,* Bartell, *supra* note 5 (collecting cases in addition to those cited here).

[16] 707 F.2d. 636, 637 (1st Cir. 1983). *Cf. Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 612, 614 (1st Cir. 1985).

[17] 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grounds,* 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979).

[18] 619 F.2d 276, 284 (3d Cir. 1980); *see also Walker v. Robbins Hose Co.*, 622 F.2d 692, 694-95 (3d Cir. 1980); *Id.* at 695-97 (Sloviter, J., dissenting).

[19] 585 F.2d 618, 623-24 (4th Cir. 1978).

In *Berry v. McLemore* [20] and *Jones v. Diamond,* [21] cases the majority today overrules, this circuit has awarded expert witness fees under § 1988.

The Sixth Circuit, in *Northcross v. Board of Education of Memphis City Schools,* [22] held that, although costs such as expert witness fees that were paid to third parties could not be considered part of attorney's fees, all other out-of-pocket expenses normally billed to a fee paying client should be included in § 1988 fee awards. The court approved the award of expert witness fees under the district court's Rule 54(d) discretion, independent of the attorney's fee statute.

The Seventh Circuit has frequently addressed the issue, permitting the award of all reasonable and necessary costs of litigation in *Redding v. Fairman,* [23] and specifically approving the award of expert witness fees under § 1988 in *Heiar v. Crawford County* [24] and in *Strama v. Peterson.* [25] Other Seventh Circuit cases have permitted the award of telephone, postage, copying, deposition, and travel expenses, [26] paralegals' hourly fees, [27] or simply "all reasonable out-of-pocket litigation expenses." [28]

The Eighth Circuit, in *Easley v. Anheuser-Busch, Inc.,* [29] has awarded expert witness fees for in-court testimony and, in *American Family Life Assurance Co. v. Teasdale,* [30] for pre-trial

---

[20] 670 F.2d 30, 34 (5th Cir. 1982). *See also Richardson v. Byrd,* 709 F.2d 1016, 1023 (5th Cir.), *cert. denied,* 464 U.S. 1009, 104 S.Ct. 257, 78 L.Ed.2d 710 (1983) (awarding paralegal fees).

[21] 636 F.2d 1364, 1382 (5th Cir.), *cert. denied,* 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981).

[22] 611 F.2d 624, 639-40 (6th Cir. 1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

[23] 717 F.2d 1105, 1119 (7th Cir. 1983), *cert. denied,* 465 U.S. 1025, 104 S.Ct. 1282, 79 L.Ed.2d 685 (1984).

[24] 746 F.2d 1190, 1203-04 (7th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985).

[25] 689 F.2d 661 (7th Cir. 1982).

[26] *Heier, supra; Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1282 (7th Cir. 1983); *Strama, supra.*

[27] *Heier, supra; Strama, supra.*

[28] *Henry v. Webermeier,* 738 F.2d 188, 192 (7th Cir. 1984).

[29] 758 F.2d 251, 257 (8th Cir. 1985).

[30] 733 F.2d 559, 571 (8th Cir. 1984).

consultations. It has also approved the award of all reasonable out-of-pocket expenses under § 1988.[31]

The Ninth Circuit, in *Thornberry v. Delta Airlines, Inc.*,[32] awarded paralegal expenses, the costs of travel, and all out-of-pocket expenses under § 1988. It adopted the position of the Sixth Circuit in *Northcross*, allowing expert witness fees and other third-party payments to be awarded under Rule 54(d) rather than under § 1988.

The Tenth Circuit, in *Ramos v. Lamn*,[33] awarded similar costs, including expert witness fees, and approved the award of all costs that would normally be billed separately to clients by a typical law firm in the area.

As I have already noted, in *Dowdell v. City of Apopka Fla.*,[34] the Eleventh Circuit awarded all reasonable expenses not normally absorbed by the attorney as over-head,[35] even though it does not allow simliar expenses to be awarded under Rule 54(d) discretion.[36] The Court wrote "[w]e reject any interpretation of "reasonable costs" which would penalize attorneys for undertaking civil rights litigation. 'No one expects a policemen, or an office holder, to pay for the privilege of enforcing the law.'"[37] And the District of Columbia Circuit has held, in *Laffey v. Northwest Airlines, Inc.*,[38] that § 1988 authorizes the award of all reasonable costs normally passed on to clients. The court wrote

> [W]e need not attempt to trace an unwavering line between those out-of-pocket expenses which are

---

[31] *Id.*

[32] 676 F.2d 1240, 1244-45 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983).

[33] 713 F.2d 546, 558-60 (10th Cir. 1983).

[34] 698 F.2d 1181, 1188-92 (11th Cir. 1983) (quoting remarks of Sen. Tunney, 122 Cong.Rec. 33,313 (1976)).

[35] *See also Allen v. U.S. Steel Corp.*, 665 F.2d 689, 696-97 (5th Cir. 1982) (deposition and paralegal expenses).

[36] *See, e.g., Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985); *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983).

[37] 698 F.2d at 1191.

[38] 746 F.2d 4, 30 (D.C. Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985)

> compensable and those which are not. The line of division—as with the hourly rate—should fall where the market has placed it. Some law firms routinely pass such costs on; others charge slightly higher fees and absorb those costs. It would grant a windfall to attorneys to reimburse them for expenses which normally are absorbed as part of their overhead; it would penalize them to deny compensation for expenses which they expect to pass directly to clients. The appellees are entitled to these costs upon showing that such costs are of a type passed on by the firms involved to private clients.[39]

Until today, no circuit has limited the award to litigation expenses incidental to attorney's fees under § 1988 to the costs enumerated in § 1920.[40] None has found reason to treat expert witness fees as sui generis, and none has applied *Alyeska* in this context.

IV.

The majority takes *Alyeska* as its guide, although that case does not reach, and certainly does not determine, the question of what adjuvant expenses may be included within a statutorily authorized award of attorney's fees. The *Alyeska* Court refused "to fashion a far-reaching exception to [the] 'American Rule' "[41] that would permit district courts to award attorney's fees *without statutory authorization* whenever a plaintiff, acting as a "private attorney-general," vindicated a statutorily endorsed public policy. The Court held only that Congress, not federal courts, must dictate which statutes, when enforced by private citizens, warrant the recovery of attorney's fees.

The *Alyeska* opinion refers to § 1920 in recounting the history of the American courts' authority to award attorney's fees. It traces the present version of § 1920 back to an 1853 statute that permitted certain enumerated costs, "and no other

---

[39] *Id.*

[40] *See also* Bartell, *supra* note 5 at 589-96.

[41] 421 U.S. at 247, 95 S.Ct. at 1616.

compensation [to] be taxed and allowed to attorneys." [42] The Court suggests in footnote dicta that, although there is no similar language in the present version of § 1920, "nothing . . . indicates a congressional intention to depart from" the exclusion of other costs and fees mandated by the 1853 rule.[43]

Immediately thereafter, the Court adds that neither the 1853 statute nor any of its successors have been construed to interfere "with the historic power of equity" to award *attorney's fees* in limited circumstances, such as for the recovery of a common fund, willful disobedience of a court order, or bad faith litigation.[44] The Court does not imply that these examples bound a court's equitable powers to tax the costs of litigation. It concludes only that these three exceptions "are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, [and that] none of the exceptions is involved here." [45]

Attorney's fees are not synonymous with costs, and the Supreme Court has long ago held that the 1853 attorney's fee statute does not deal "expressly or by implication with the subject of taxing as costs the expense of [experts or stenographers]." [46] The *Alyeska* dictum does not require us to limit the costs that a district court may tax to those enumerated in § 1920, and *Alyeska* clearly has no bearing on fee awards authorized by statute.

Recourse to *Alyeska* is particularly inappropriate in § 1988 cases. As the legislative history of that section repeats time and again, § 1988 was enacted expressly to counteract the effect of

---

[42] *Id.* at 253, 95 S.Ct. at 1620.

[43] *Id.* at 255 nn. 28 & 29, 95 S.Ct. at 1621 nn. 28 & 29.

[44] *Id.* at 257-58, 95 S.Ct. at 1621-22. (emphasis added).

[45] *Id.* at 259, 95 S.Ct. at 1622.

[46] *In re Peterson*, 253 U.S. 300, 317, 40 S.Ct. 543, 549, 64 L.Ed. 919 (1920); *see also Newton v. Consolidated Gas Co.*, 265 U.S. 78, 83, 44 S.Ct. 481, 482-83, 68 L.Ed. 909 (1924).

the *Alyeska* decision.[47] The House Report notes that "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision," [48] that its effect was "devastating," and that it might "as a practical matter, repeal the civil rights laws for most Americans." [49] Similarly, the Senate Report begins by stating that the Act was intended to remedy the gaps created in our civil rights laws by *Alyeska*.[50] To impose the limitations and policies of *Alyeska* on fee awards under § 1988 is to disregard entirely the primary congressional purpose behind its enactment. The traditional limitations of the American Rule, of *Alyeska*, of § 1920, and of Fed.R.Civ.P. 54(d) do not apply to awards made pursuant to § 1988, because that statute is based upon policies antithetical to those restrictions.[51]

V.

In *Christiansburg Garment Co. v. E.E.O.C.*,[52] the Supreme Court held that a prevailing civil rights defendant should be awarded attorney's fees under § 1988 only when the plaintiff's suit was frivolous, unreasonable, or unfounded.

The majority decides that, because a fee-shifting statute applies in *Woodworkers*, and because that statute does not expressly permit expert witness fees, the court has no authority to award them, presumably not even under the *Alyeska* criteria which are to be applied in the absence of a fee-shifting statute. The majority ignores the similarity between the *Alyeska* standard of vexatious or oppressive actions and the *Christiansburg* standard of unfounded or vexatious litigation: expert witness fees that might have been taxed to the plaintiff for bringing an unfounded tort suit may no longer be taxed for bringing an

---

[47] *See, e.g.* S.Rep. No. 1011, 94th Cong., 2d Sess. 1, 4-6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2-3 (1976); 122 Cong.Rec. 31,472, 31,474, 33,314 35,122-28 (1976). *See also Evans v. Jeff D.*, ____ U.S. ____, ____, 106 S.Ct. 1531, 1546, 1549, 89 L.Ed.2d ____ (1986) (Brennan, J., dissenting).

[48] H.R.Rep. No. 1558, 94th Cong. 2d Sess. 2 (1976).

[49] 122 Cong.Rec. 35,128 (1976).

[50] S.Rep. No. 1011, 94th Cong., 2nd Sess. 1 (1976).

[51] *Dowdell*, 698 F.2d at 1189 n. 12 (11th Cir. 1983).

[52] 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

equally unfounded civil rights or employment discrimination action. Even if Congress did not intend that expert witness fees be awarded as a component of attorney's fees, as I believe it did, it surely did not intend by its reference to attorney's fees to lessen the courts' general authority to award other costs as a deterrent to frivolous litigation. Yet that is the result of the majority's rule.

I believe that the *Woodworkers* district court reached the right result for the right reasons. It found that the suit had a reasonable basis and applied *Christiansburg* to deny the defendant attorney's fees. It properly applied the same standard and invoked the same discretion to deny expert witness fees that might have constituted a reasonable expense incidental to the award of attorney's fees. And although, for reasons I will discuss in the next section, the court also had discretion under Rule 54(d) to tax expert witness fees as costs, it declined to do so. The court's denial of the award should, therefore, be affirmed.

VI.

Had the plaintiff prevailed in *Gibbons*, it would have been entitled both to treble damages and "the cost of suit, including a reasonable attorney's fee." [53] The rule adopted by the majority would not permit such a successful plaintiff to recover expert witness fees and, I submit, by inexorable logical extension, any other out-of-pocket expenses not enumerated in § 1920 for which the plaintiff's counsel would normally have billed his client. Although some circuit courts have reached the same result in Clayton Act litigation, this seems to me to be incorrect. Allowing a prevailing party treble damages, attorney's fees, and even, at times, prejudgment interest, but denying recovery of all of the other expenses incident to litigation is anomalous. There would be no reason to specify by statute that the cost of suit might be awarded if those costs referred only to the expenses ordinarily taxed to the loser. As Professor Moore points out, "had Congress intended 'cost of

[53] 15 U.S.C. § 15 (1982).

suit' [in the Clayton Act] to include ... taxable costs, it would have said so." [54]

In *Gibbons*, however, the defendant prevailed and no statutory fee-shifting provision entitled it to attorney's fees. In the absence of any other provision, Fed.R.Civ.P. 54(d) controls. It is succinct:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . .

That rule does not define the term "costs." The majority construes it to restrict the definition of "costs" to those costs specified in § 1920. It does so by finding that § 1920 is an express statutory provision that governs, and provides the exclusive authority for, the award of expert witness fees, obviating the discretion allowed by Rule 54(d), and prohibiting the taxing of any costs not listed therein.

Section 1920 does not on its face purport to be exclusive. It does not say, "only the following costs" shall be allowed. Neither does it provide expressly for the taxing of expert witness fees. Its phrasing is permissive because it was revised, after enactment of the Federal Rules, in recognition of the discretion that Rule 54(d) affords.[55] It is not, therefore, the kind of "express provision" that is an exception according to the terms of Rule 54(d). If it were, then § 1920 would control every case, and Rule 54(d) would be completely redundant, without any independent force or meaning.

Even if the majority were correct in holding that § 1920 is exclusive, the majority does not follow this interpretation to its logical conclusion, for the majority holds that, in the exceptional circumstances borrowed from *Alyeska* § *1920 does not apply* and some other unspecified authority affords the court broader discretionary powers. If, on the other hand, the majority means that § 1920 is not *always* exclusive, then it fails

---

[54] 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice § 54.71[3] (2d ed. 1982).

[55] 1948 United States Code Congressional Service 1887-88 (80th Cong., 2d Sess.).

to explain how § 1920 can abrogate the discretion Rule 54(d) appears to give, and why expert witness fees should be treated differently from all other costs.

Those circuits that have refused to permit the taxation of expert witness fees under Rule 54(d) have, like the majority, relied on a 1932 Supreme Court decision, *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway,*[56] in which the court wrote that expert witness fees were included within, and limited to, the per diem and travel allowances for ordinary witnesses in 28 U.S.C. §§ 600(a) & (c) (precursors of 28 U.S.C. §§ 1920 & 1821). The Court held that federal courts had no authority, either in their discretion or under state law, to award as costs compensation to witnesses in excess of the statutory amount.[57]

Although the issue in *Henkel* was the same as that now presented, the district court powers that it described have since changed. *Henkel* was decided before the adoption of the Federal Rules of Civil Procedure and before the merger of actions at law and equity. It was written in answer to a certified question inquiring whether district courts had the authority to tax expert witness fees as costs in a case at law. At that time, courts sitting in law had no power to award costs not expressly granted by statute.[58] At equity, as *Alyeska* affirms, courts have always retained the power to award fees not specified by statute.[59] With the merger of law and equity, Rule 54(d) gave federal courts in all actions the broader discretion previously afforded only to courts of equity. As Judge Frank wrote:

> [Rule 54(d)] appears to have adopted, for suits covered by it, the previous federal practice in equity,

---

[56] 284 U.S. 444, 52 S.Ct. 223, 76 L.Ed. 386 (1932).

[57] *Id.* at 446, 52 S.Ct. at 224.

[58] *See* 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2665, at 170 (2d ed 1983); Payne, Costs in Common Law Actions in the Federal Courts, 21 Va.L.Rev. 397, 399—400 (1935).

[59] *See Supra* note 53. *See Also In re Peterson,* 253 U.S. 300, 316, 40 S.Ct. 542, 548, 64 L.Ed. 919 (1920).

> according to which the trial court had wide discretion in fixing costs, a discretion not reviewable unless manifestly abused. . . . [60]

This conclusion is confirmed by Wright & Miller who state that Rule 54(d) today "makes the allowance of costs discretionary and, thus, adopts the practice formerly followed in equity rather than at law." [61]

Since the adoption of Rule 54(d), the Supreme Court has only once addressed the district courts' power to tax costs, and the majority fails to consider fully the significance of that decision. *Farmer v. Arabian American Oil Company* [62] makes clear that Rule 54(d) authorizes a court, in its discretion, to tax costs in excess of those mentioned in § 1920. As several circuits have noted, it modifies the lingering effect of *Henkel*.[63]

In *Farmer*, no fee-shifting statute applied. The district court had refused to tax as costs litigation expenses for witness travel and overnight transcripts. While the Supreme Court affirmed this disallowance, the Court did not rest its decision on a determination of whether § 1920 permitted these costs or on some other rule limiting the taxation of costs. Instead it relied only on Rule 54(d), saying:

> We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. . . . [T]he discretion given district

---

[60] *Harris v. Twentieth Century Fox. Film Corp.*, 139 F.2d 571 n. 1 (2d Cir.1943); *see also Cox v. Maddux*, 285 F.Supp. 876, 879 (E.D.Ark. 1968); *Farrar v. Farrar*, 106 F.Supp. 238, 241 (W.D.Ark. 1952); *Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50 (D.Neb.1949); *Abel v. L. Loughman*, F.R.D. 734 (E.D.N.Y.1941); 4 C. Wright & A. Miller Federal Practice and Procedure: Civil § 1044 at 152.

[61] 10. C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2665, at 171 (2d ed. 1983).

[62] 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964).

[63] *See e.g., Paschall v. Kansas City Star Co.*, 695 F.2d 322 338 (8th Cir.1982), *rev'd on other grounds*, 727 F.2d 692 (1984); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3d Cir.1981).

> judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute.[64]

The Court's conclusion reveals its premise: Rule 54(d) gives the district court discretion to award costs not enumerated in § 1920.

Although *Farmer* did not involve expert witness fees, the Court noted with approval that the district court denied the excess costs because they were not indispensable to the litigation and had not received prior approval, which might have kept the costs to a minimum or alerted the parties in advance that they would be taxable.[65] These two considerations—indispensability and prior court approval—have been taken as guidelines by those circuits that permit courts the discretion to tax expert witness fees under Rule 54(d).

The First Circuit has permitted the discretionary award of expert witness fees for courtroom testimony, noting that an express finding that the testimony was indispensable is usually required, but that prior court approval will suffice.[66] Indeed, the First Circuit's leading case reversed an award of attorney's fees under the *Alyeska* standards at the same time that it upheld an award of expert witness fees under *Farmer*.[67]

The Third Circuit, in the maritime tort case of *Roberts v. S.S. Kyriakoula D. Lemos*,[68] expressly permitted the awarded of expert witness fees "when the expert's testimony is indispensable to the determination of the case," or "played a crucial role in the resolution of the issues presented."[69] The court wrote:

> While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to insure moderation in

---

[64] *Id.* at 235, 85 S.Ct. at 416.

[65] *Id.* at 233-35, 85 S.Ct. at 415-16.

[66] *Gradmann & Holler GMBH v. Continental Lines, S.A.* 679 F.2d 272, 274 (1st.1982); *see also Templeman v. Chris Craft Corp.*, 770 F.2d 245 (1st Cir.1985) (employment discrimination); *Heddinger v. Ashford Memorial Community Hospital*, 734 F.2d 81 (1st Cir.1984) (diversity).

[67] *See Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir.1982).

[68] 651 F.2d 201 (3d Cir.1981).

[69] *Id.* at 206.

> the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures.[70]

Our own circuit has permitted expert witness fees to be awarded not only under § 1988,[71] but in cases of bad faith litigation,[72] and when, after prior court approval, the testimony proved indispensable to the determination of the case.[73]

The Sixth Circuit has affirmed an award of expert witness fees in a civil rights case, rejecting the argument that such fees were expenses incidental to § 1988 attorney's fees, and awarding them instead "pursuant to the court's sound discretion under" § 1920 and Rule 54(d).[74] The district court had reduced the amount allowed to one-half the amount claimed because the expense had been incurred without prior approval of the court and was excessive.

The Eighth Circuit, like the Third, has permitted the award of expert witness fees adopting *Farmer* guidelines.[75] Although it did so in an antitrust case arising under the Clayton Act, the court relied only on *Farmer*, holding that "Fed.R.Civ.P. 54 authorizes district judges to award costs not specifically enu-

---

[70] *Id.*

[71] *Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir.1982); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir.1981).

[72] *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971). *But see Baum v. United States*, 432 F.2d 85 (5th Cir. 1970) (Rule 43(d) discretion limited to statutory witness fees); *United States v. Kolesar*, 313 F.2d 835 (5th Cir.1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir.1962) (no discretion to award expert witness fees).

[73] *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1100 (5th Cir.1982) (Clayton Act).

[74] *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979); *see also Smillie v. Park Chemical Co.*, 710 F.2d 271 (6th Cir.1983) (SEC action); *but see Murphy v. International Union of Operating Engineers*, 774 F.2d 114 (6th Cir.1985) LMRDA action).

[75] *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39 (8th Cir.1982), *rev'd on other grounds en banc*, 727 F.2d 692, *cert denied*. ____U.S.____, 105 S.Ct. 222, 83 L.Ed.2d 152 (1984); *see also Hiegel v. Hill*, 771 F.2d 358 (8th Cir.1985) (§ 1983); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir.1985) (§ 1983); *Coleman v. Omaha*, 714 F.2d 804, 809 (8th Cir.1983) (employment discrimination); *Linneman Construction, Inc. v. Montana-Dakota Utilities Co., Inc.*, 504 F.2d 1365 (8th Cir.1974).

merated in 28 U.S.C. § 1821 [or § 1920]." It has reached the same result in cases that do not involve a fee-shifting statute.[76]

The Ninth Circuit permits the award of expert witness fees if the testimony is necessary to the case and the fees are reasonable. In *Thornberry v. Delta Airlines, Inc.*, it describes the court's authority to award these costs as limited to "special circumstances." However, it interprets these circumstances broadly, considering "the reasonable needs of the party in the context of the litigation." [77] While *Thornberry* was a civil rights case, to which § 1988 was applicable, the court relied only upon Rule 54(d).

The District of Columbia Circuit has found no authority for a court to award excess expert witness fees but qualified this rule by an exception "if the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the case." [78]

Other circuits have denied the award of expert witness fees in excess of the amount allowed ordinary witnesses by 28 U.S.C. § 1821.[79] The Second [80] and Fourth [81] Circuits have addressed the issue only in anti-trust cases and have held, I

---

[76] *Nemmers v. City of Dubuque*, 764 F.2d 502, 506 (8th Cir.1985) (zoning action). *See also Nebraska Public Power Dist. v. Austin Power, Inc.*, 773 F.2d 960 (8th Cir.1985) (diversity).

[77] 676 F.2d 1240, 1245 (9th Cir.1982), *vacated on other grounds*, 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983); *see also Shakey's Inc. v. Covalt*, 704 F.2d 426 (9th Cir.1983) (trademark infringement). *But see Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 & n. 67 (9th Cir.1964).

[78] *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066 n. 11 (D.C.Cir.1981) (diversity); *See also Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093, 1128 n. 20 (D.C.Cir.1985) (employment discrimination); *Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370 (C.A.D.C.1980) (Truth in Lending Act).

[79] *See* Bartell, *supra* note 5, at 591.

[80] *Berkey v. Eastman Kodak*, 603 F.2d 263 (1974), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); *Trans World Airlines v. Hughes*, 449 F.2d 51, 81 (2d Cir.1971).

[81] *Speciality Equipment & Machinery Corp. v. Zell Motor Car Co.*, 193 F.2d 515, 520-21 (4th Cir.1952).

believe incorrectly, that the Clayton Act's allowance of "cost of suit" does not permit awards in excess of § 1920 costs. The Seventh Circuit recognizes that courts "retain some discretion to tax costs not specifically provided for by statute," citing *Farmer*, but limits that discretion to unspecified "exceptional circumstances." [82] Finally, the Tenth [83] and Eleventh [84] Circuits have categorically denied district courts the discretionary authority to award witness fees in excess of the amounts specified in § 1821, although they have not extended this limitation to § 1988 cases.

In sum six circuits permit the award of expert witness fees when the testimony is indispensable or when advance court approval is obtained, in accordance with the Supreme Court's distum in *Farmer*, and as we have held in prior cases. Two circuits categorically deny district courts any authority under the Clayton Act, and two deny them any authority under Rule 54(d), to award costs not provided for by statute. But none engrafts the *Alyeska* attorney's fees exceptions onto a rewritten § 1920.

Pursuant to Rule 54(d), the district court should be permitted in its discretion, sparingly exercised, to award a prevailing party expert witness fees, reasonable in amount, for courtroom testimony in cases in which the testimony was indispensable to resolution of the case. District courts should be given discretion to adopt local rule limiting the award of such fees to cases in which prior court approval was given.

---

[82] *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 n. 14 (7th Cir.1981); *see also Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir.1982) (§ 1988); *Adams v. Carlson*, 521 F.2d 168 (7th Cir.1975) (prisoner's suit); *Fey v. Walston & Co.*, 493 F.2d 1036 (7th Cir.1974) (SEC action).

[83] *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir.1979) (diversity); *but see Ramos v. Lamm*, 713 F.2d 546 (10th Cir.1983) (awarding expert witness fees under § 1988 as incidential expenses).

[84] *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir.1985). *Kivi & Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir.1983). *But see Dowdell v. City of Apopka, Fla.* 698 F.2d 1181, 1188-89 (11th Cir.1983) (awarding all out-of-pocket expenses under § 1988).

VII.

In *Gibbons,* the district court carefully reviewed the evolving law in our circuit, and in the Third, Sixth, and Eighth Circuits before concluding, as do I, and as did those circuits, that *Farmer* has modified what remains of *Henkel,* and that expert witness fees in excess of those allowed by statute may be awarded if they were indispensable to the litigation. The district court noted that, "It is particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where the defendants were forced to defend an extremely burdensome, vexatious, and totally meritless array of antitrust claims." [85] It carefully reviewed the importance of the testimony of each of the three expert witnesses whose fees were sought to be taxed and concluded that the testimony of only two was "crucial and indispendable to the presentation of the defendants' case." It also examined the reasonableness of the fees of those two witnesses before ordering that they be taxed. The *Gibbons* court applied the right test and, in a carefully reasoned exercise of its discretion, reached a result that I would affirm.

VIII.

The costs of litigation, as we all know, have become staggering. A plaintiff may put a defendant or a defendant may put a plaintiff to a tremendous amount of expense, apart from the cost of obtaining an attorney's services, in defending or prosecuting a case. One cause of this expense is the unavoidable necessity of expert witness testimony to establish or rebut many legal claims, especially those raised in civil rights and antitrust cases. A study cited by a student writer suggests that expert testimony controls the outcome in two-thirds of all cases, and that expert witness fees are second only to attorney's fees as the largest litigation expense.[86]

---

[85] *J.T. Gibbons v. Crawford Fitting Co.*, 102 F.R.D. 73 86 (E.D.La.1984).

[86] footnote not supplied.

A rule that denies a prevailing party who is entitled to attorney's fees the right to recover the other costs for which his lawyer bills him gives the vindicated party only half a victory. Although the victor in litigation is not entitled to spoils, he ought at least be able to invoke the court's discretion to make him whole.

APPENDIX B

No. 83-4616.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Feb. 7, 1985.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, CLC AND ITS LOCAL NO. 5-376,
Plaintiff-Appellee,

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellant.

Fuselier, Ott & McKee, M. Curtiss McKee, Jeffrey A. Walker, Jackson, Miss., for defendant-appellant.

Youngdahl, Larrison & Agee, James E. Youngdahl, Little Rock, Ark., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WISDOM, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

This case is hopefully the final chapter in the litigation commenced in April 1978 by International Woodworkers of America, AFL-CIO, CLC (IWA), and one of its local unions against Champion International Corporation (Champion) alleging racial discrimination in employment in violation of Title VII and 42 U.S.C. § 1981 at Champion's Oxford, Mississippi plant. In 1982, after a trial, the district court entered a judgment on the merits dismissing the claims of all plaintiffs and assessing all costs against IWA. In April 1984, this court affirmed the district court's judgment on the merits.

During the interim between the entry of the district court's judgment and the decision by this court, Champion filed a bill of costs and motion for allowance of Champion's attorneys' fees as a part of the costs of the case. In December 1982, the district court entered an order denying Champion's motion for attorneys' fees, finding that "the record demonstrates that the lawsuit was brought in good faith and was neither frivolous, unreasonable nor without foundation." *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The district court referred all other costs questions to a magistrate. The magistrate awarded Champion $14,750.87 in costs, of which $11,807.16 were for a portion of the services of an expert witness employed by Champion for the statistical aspects of the case. IWA objected to certain parts of the award, particularly to the taxing of the expert witness' fees in an amount which exceeded that provided for in 28 U.S.C. § 1821(a)(1), and the case returned to the district court.

In August 1983, the district court entered an order sustaining IWA's objections to taxing the excess expert witness' fees. The district court found that the "plaintiffs do not contest the reasonableness of the expert witness' fees nor that the expert's testimony was an important part of the defendant's case." The district court also expressed the view that the "defendant's expert was helpful and perhaps necessary to its case." Following a thorough and careful review of the relevant statutes and caselaw, the district court concluded that this court, in *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir.) (en banc), *cert. granted*, 452 U.S. 959 101 S.Ct. 3106, 69 L.Ed.2d 970, *order amended, partial cert. granted*, 453 U.S. 911, 101 S.Ct. 3141, 69 L.Ed.2d 993, *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), had, in effect, adopted for purposes of expert witness' fees the rule adopted by the Supreme Court in *Christiansburg* for attorneys' fees, i.e., prevailing defendants are entitled to attorneys' fees only when the lawsuit is frivolous, unreasonable, or without foundation. Following that rule, the district court refused to grant Champion expert witness' fees in excess of the amount provided by 28 U.S.C. § 1821 based on its prior holding, in the attorneys' fees context, that IWA's suit was not frivolous, unreasonable, without foundation, or brought in

bad faith. Champion appeals the disallowance of its excess expert witness' fees.

Champion argues that the *Christiansburg* test applied by the district court is the wrong test and argues instead for a test that would award excess expert witness' fees to a prevailing defendant if "the expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case," citing our decision in *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1100 (5th Cir. 1982) *modified on other grounds*, 701 F.2d 542 (5th Cir.1983) (en banc). We do not agree that *Copper Liquor* is authority for the broad proposition for which it is cited by Champion. *Copper Liquor* is itself a case arising under the Clayton Act which contains a specific statutory provision awarding to the winner the "cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. The treatment in *Copper Liquor* and its progeny, *see Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019, 1033 (5th Cir.1983), of excess expert witness' fees does not control in this Title VII, § 1981 case. The paragraph in *Copper Liquor* setting forth the general rules on fees of expert witnesses is, however, instructive:

> Expert witnesses generally may be allowed only the fees allowed "fact" witnesses, as prescribed by 28 U.S.C. § 1821. Courts of appeal have approved trial court discretion to award the full fee charged by the expert in exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case. If counsel plan to seek allowance of the entire expert's fee, the better practice is to seek court approval before calling the expert witness. The court should consider these factors if counsel seek an allowance for experts in excess of the fee allowed for fact witnesses.

684 F.2d at 1100 (footnotes omitted). Significantly, with one exception [1] not here relevant, the cases cited in *Copper Liquor*

---

[1] *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 636-37 (5th Cir.) (district court can award costs, including attorneys' fees and expert witness' fees, against plaintiff when an unfounded action or defense is maintained in bad faith, vexatiously, wantonly, or for oppressive reasons), *cert. denied*, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971).

which were decided by this court and in which excess fees were allowed are civil rights cases in which the fees have been allowed to prevailing *plaintiffs*. The rationale for the awarding of these fees is stated simply and directly in *Jones v. Diamond*, *supra*, 636 F.2d at 1382: "Without the ability to recover experts' fees, plaintiffs, particularly prison immates who are almost always indigent, will be unable to bring these cases." *See also Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982). But those considerations do not apply to prevailing defendants who are not engaged in vindicating their civil rights. *See Strong v. Ponder*, 572 Supp. 129 (N.D. Ga. 1983). We see no reason, therefore, to extend to prevailing defendants the right to recover excess expert witness' fees on the basis contended for by Champion.

We note that the district court construed *Jones v. Diamond* as adopting for civil rights cases involving excess expert witness' fees incurred by prevailing defendants the standard adopted by the Supreme Court in *Christiansburg* for Title VII cases involving attorneys' fees incurred by prevailing defendants. In view of the district court's finding, unchallenged on appeal by Champion, that the IWA-Champion litigation did not meet that standard, we need not decide whether, if it had, Champion's excess expert witness' fees would have been awardable.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. WC 78-33-WK-P

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, CLC, et al.,
Plaintiffs,

v.

CHAMPION INTERNATIONAL CORP.,
Defendant.

MEMORANDUM ORDER

This action comes before the Court on plaintiffs' objection to costs assessed by the Clerk of Court. On September 10, 1982, this Court entered judgment in this case dismissing the complaint in its entirety and taxing all costs against plaintiffs. On December 30, 1982, following defendant's motion for allowance of attorney's fees and expenses as a part of the costs, this Court denied an award of attorney's fees upon an express finding that the lawsuit was not brought in bad faith nor was it frivolous, unreasonable, or without foundation as is required to award attorney's fees to a prevailing defendant. *See Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 422, 54 L. Ed.2d 648, 657 (1978) (attorney's fees may be awarded to prevailing defendant only where plaintiffs' action was frivolous, unreasonable, without foundation, or brought in bad faith). The motion was then referred to the Clerk for disposition of issues and disputes concerning the taxing of costs. On April 27, 1983, the Clerk entered an order taxing costs in the amount of $14,750.87.

I. Deposition Costs

Plaintiffs object to the taxing of costs for various depositions which in some way relate to the labor relations policies of the union, an issue raised by the defendant and ultimately rejected by the court. However, the Court is convinced that the disputed depositions contain relatively few references to the labor relations policies of the union and were all reasonably necessary for defendant's preparation for trial. *See Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534 (N.D. Miss. 1978) (expenses of depositions reasonably necessary for party's preparation for trial are taxable as costs). Plaintiffs also object to taxing costs for several depositions because no separate indication of their costs included in defendant's original bill of costs. To the extent such a deficiency may prevent recovery of costs, we are of the opinion it is cured by the exhibits itemizing these deposition costs attached to defendant's memorandum in opposition to plaintiffs' objections.

II. Expert Witness Fees

Plaintiffs next object to defendant's claim for expert witness' fees. Although plaintiffs do not contest the reasonableness of the expert witness' fees nor that the expert's testimony was an important part of defendant's case, they argue that in a Title VII case taxing expert witness' fees are subject to the same standard as attorney's fees which was set forth in *Christiansburg Garmet Co. v. EEOC*, 434 U.S. 412, 54 L. Ed.2d 648 (1978).[1] Defendant counters that expert witness fees are governed by the traditional rule in civil cases and exemplified in this circuit by *Gerber v. Stoltenberg*, 394 F.2d 179 (5th Cir. 1968).

---

[1] In *Christianburg* the Supreme Court found a congressional intent in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), to permit a prevailing plaintiff an award of attorney's fees as a matter of course but to allow a prevailing defendant an award of attorney's fees only upon a finding that plaintiff's claim was frivolous, unreasonable, without foundation, or brought in bad faith. 434 U.S. at 422.

A. Statutory Authority

28 U.S.C. § 1821(a)(1) (Supp. 1983) mandates reimbursement of attendance and mileage expenses for "a witness in attendance at any court of the United States . . . ." *Id.* The current attendance fee is $30.00 per day with normal travel expenses governed by 5 U.S.C. sections 5702 and 5704 which concerns official travel of employees of the Federal Government. *Id.* at § 1821(b), (c), (d). This section applies to lay and expert witnesses alike and thus forbids taxation of expert witness' fees in excess of the statutory amount. *E.g., Henkel v. Chicago, St. P. M. & O. Ry. Co.*, 284 U.S. 444, 448, 76 L. Ed. 386, (1932) (excess fees to expert witnesses not allowed or taxable as costs in federal court); *Jones v. Diamond*, 636 F.2d 1364, 1382, *amended* 453 U.S. 911, 69 L. Ed.2d 993, *cert. dismissed*, 453 U.S. 950, 69 L. Ed.2d 1033 (5th Cir. 1981) (normal civil litigation rule disallows excess fees for expert witnesses); *Gerber v. Stoltenberg*, 394 F.2d 179 (5th Cir. 1968) (no validity to claim for expert witness' fees in excess of statutory amount).

B. Equity Power in Non-Civil Rights Litigation

In non-civil rights cases, the courts have allowed expert witness' fees, independently of § 1821, but only through exercise of the equity power of the federal courts upon a showing of exceptional circumstances as exist in unfounded cases "maintained in bad faith, vexatiously, wantonly, or for oppressive reasons." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir. 1971). The courts of this district, however, have strayed, in dicta but not in result, from this strict construction of the "exceptional circumstance" rule. A long line of Northern District cases culminating with *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534 (N.D. Miss. 1978), has, in dicta, suggested broadening the "exceptional circumstance" rule to include situations in which (1) a party had no opportunity to obtain prior court approval of expert witnesses, and (2) the expert's testimony was indispensable to the case and lay testimony is inappropriate. *See, e.g., Morris v. Carnathan*, 63 F.R.D. 374, 379 (N.D. Miss. 1974) (only in unusual circumstances will excess fees be awarded); *Wade v. Mississippi*

Cooperative Extension Service, 64 F.R.D. 102, 105 (N.D. Miss. 1974) (excess fees awardable where party had no opportunity to obtain prior approval or expert testimony was indispensable to case); *Brooks v. Town of Sunflower*, Civil Action No. GC 71-57-K (N.D. Miss. Mar. 27, 1975) (Memorandum Opinion) (excess fees warded since expert testimony absolutely necessary for development of case); *Worley, supra*, at 539-42. These cases expanded the limits of the courts' equity powers as established by the Fifth Circuit in *Humble Oil, supra*, and no cases can be found outside this district to support such an extension. The cases also blur any distinction which may have existed between *civil rights* and *non-civil rights* litigation. In fact, several of this court's decisions allowing excess expert witness' fees involved civil rights plaintiff. *See Brooks, supra; Yarbrough v. Town of Ackerman*, Civil Action No. EC 75-163-K (N.D. Miss. Feb. 1977); (plaintiffs in each case allowed excess expert witness fees in racial discrimination suits). To the extent these opinions exceed the court's equitable powers set out in *Humble Oil supra*, in *non-civil rights* actions, we overrule them. In non-civil rights cases, expert witness' fees in excess of that allowed by § 1821 may be awarded only through exercise of the equity power of the federal court upon a showing that an unfounded action or defense was maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.

C. Civil Rights Cases

In *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (*en banc*), the Fifth Circuit was faced with the question of whether a prevailing *plaintiff* in a *civil rights* suit could recover the cost of fees paid for expert witnesses. The court reviewed the traditional rule that expert witness' fees are generally not recoverable as costs and experts are compensable only at the same rate as other witnesses. *Id.* at 1382. However, the court then announced that congressional intent dictated a different rule in civil rights litigation. To support this holding, the court cited the Senate Report to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which provides:

> If private citizens are to be able to assert their civil rights, and if those who violate the nation's

> fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate those rights in court.

Id. citing S. Rep. 94-1011, 94th Cong.2d Sess. 2, *reprinted in* U.S. Code Cong. & Ad. News 5908, 5910. This recitation of congressional intent is identical to that recognized in *Christianburg*, and, in fact, the Senate Report relies heavily upon the congressional intent expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), S. Rep. 94-1011, 94th Cong., 2nd Sess. 2, *reprinted in* U.S. Code Cong. & Ad. News, 5908, 5910, which was the precise subject of *Christianburg's* statutory construction. 424 U.S. at 417, 54 L. Ed.2d at 654. Such equitable considerations do not apply to prevailing defendants since they are not vindicating their civil rights and plaintiffs generally are not sued for violation of the civil rights laws.

Although the Attorney's Fees Awards Act of 1976, 42 U.S. § 1988, does not provide for awards of expert witness' fees,[2] the court relied on the legislative intent behind that Act for support. In so doing, the Fifth Circuit has, in effect, adopted for purposes of expert witness' fees the *Christianburg* rule: in order to advance the congressional purpose of encouraging suits by victims of discrimination while deterring frivolous litigation, a distinction must be made between prevailing plaintiffs, who are entitled to attorney's fees except in unusual circumstances, and prevailing defendants, who are entitled to attorney's fees only when the lawsuit is frivolous, unreasonable, or without foundation. Following this rule, the prevailing defendants in this case are entitled to an award of expert witness' fees only if plaintiffs'

---

[2] In his separate opinion in *Diamond*, Chief Judge Coleman took the majority severely to task for relying on the congressional intent of an act which cannot itself be cited for support of the award of expert witness fees. 636 F.2d at 1391 (Coleman, C.J. concurring in part and dissenting in part). Ten of the twenty-four judges who took part in the *en banc* decision dissented from this part of the court's ruling for the reason stated in Judge Coleman's separate opinion that expert witness fees, even in civil rights litigation, were not properly awarded to a prevailing plaintiff or defendant except under the traditional rule because no congressional legislation has been enacted to allow it. *Id.*

suit was frivolous, unreasonable, without foundation, or brought in bad faith.[3] Although defendant's expert witness was helpful and perhaps necessary to its case, because we have already found plaintiffs' suit was not frivolous, unreasonable, without foundation, or brought in bad faith, we decline to grant expert witness' fees in excess of the statutory amount.

Therefore, it is

ORDERED:

1. That plaintiffs' objections to costs taxed against them are overruled, except that the objection to expert witness' fees in excess of the statutory amount is hereby sustained.

2. That the issue of expert witness' fees is hereby remanded to United States Magistrate Norman L. Gillespie for further dispostion in keeping with this Memorandum Order.

This 24th day of August, 1983.

WILLIAM C. KEADY

United States District Judge

[3] This analysis is supported by the court's recent opinion in *Berry* v. *McLemore*, 670 F.2d 30 (5th Cir. 1982). Relying on the discussion in *Jones* v. *Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), the court held that a prevailing plaintiff in a 42 U.S.C. § 1983 action was entitled to recover attorney's fees and expert witness' fees because of the "different rule" applied in civil rights litigation to ensure claimants "effective and competent representation." 670 F.2d at 34, *citing Jones* v. *Diamond*, 636 F.2d at 1382.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. WC78-33-WK-P

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, CLC, *et al.*

v.

CHAMPION INTERNATIONAL CORPORATION

ORDER TAXING COSTS

On October 12, 1983, defendant filed a motion for allowance of attorney's fees and expenses as a part of the costs and bill of costs in the total sum of $38,072.20. The court entered an order on December 20, 1982, directing that all questions and disputes concerning the taxing of costs in this action be referred to United States Magistrate Norman L. Gillespie for disposition. The court was advised on October 13, 1982 that plaintiff objected to the bill of costs. Plaintiff does not object to the $135.00 statutory witness fees for Dr. Haworth and the two charges for copies of EEOC files totalling $90.50. In view of defendant's thorough explanation of the cost of deposition in the reply brief, plaintiffs' objections to the costs of the following list are denied:

Copy of deposition of Mr. Bateman, William D. Bumpus, October, 1978	$ 42.42
Copy of deposition of Mr. Stehman, May, 1979	26.06
Depositions of Brister, E. D. Henderson, Willingham, Aron, J. C. Henderson, Mathis and Booker	992.60
Depositions of Poole, Anderson and Willingham (all three listed as plaintiff's witnesses in pretrial order)	240.00
Depositions of Campbell, Reed and Gorman	1,072.35
	254.15
Total	$2,627.58

In *United States v. Kolesar,* 313 F.2d 835, the court stated: "Trial judge did not abuse discretion in permitting counsel for husband and wife, maintaining Tort Claim Act suit predicated on substantial injuries to wife as the result of surgery, to tax as costs copies of depositions of government medical officers, nurses and corpsmen." The court finds that the above-mentioned depositions were necessary for defendant's preparation for trial and there was a "reasonable need" that counsel have copies of the depositions. *Worley v. Massey-Ferguson, Inc.* 79 F. R. D. 534 (N.D. Miss. 1978).

The court sustains plaintiffs' objections to the taxation of costs in the amount of $2,742.27 and $175.00 paid to Martin and Winstead for the transcription of the statements under oath which Champion obtained shortly before trail from a number of the witnesses listed in the pre-trial order witness list of the plaintiff. There is no equity in transferring this litigation cost to the plaintiff. "Cost that merely are incidental to the trial or are incurred in preparation for it will not be considered *necessarily* incurred *for use in the case* for the purpose of Section 1920 and will not be allowed under local rule, custom and usage, or the court's inherent power." 10 C. Wright and A. Miller, *Federal Practice and Procedure,* 2677 (1973).

Plaintiff's objections to the taxation of cost in the amount of $181.50 to B. L. Holman for payment of a copy of the transcript of the class certification hearing; the amount of $72.72 to Petrie's Stenograph Service for the deposition of Mr. Walker, the IWA attorney who filed the union's EEOC charge; and the amount of $81.20 for copies of depositions of Mr. Reed and Mr. Gorman taken at the instance of the plaintiff in *Booker v. Anderson,* No. WC77-95-S (N.D. Miss. 1977), are hereby sustained.

The most important issue in this cause is the one concerning the claim of defendant for expert witness fees. In *Worley v. Massey-Ferguson, Inc.,* 79 F.R.D. 534, 521 (1978), Judge Smith's opinion leaves no doubt that this court "on rare occasions . . . has allowed expert fees exceeding the statutory amount to be taxed as costs even though the party did not get approval from the court before retaining the expert, e.g. *Yarbrough v. Town of Ackerman,* civil action No. EC75-163-K

(N.D. Miss. 2/25/77), citing with approval *Brooks v. Sunflower,* No. GC71-57-K (N.D. Miss. March 27, 1975)..." Where lay testimony in a case is inappropriate and it is indispensable for a party to obtain technical advice; this court has allowed the claim of expert witness fees. Plaintiff contends that expert fees are included as costs in civil rights cases only when they are claimed by plaintiffs; *not when defendants prevail.* In *Berry v. McLemore* 670 F.2d 30, 34 (5th Cir. 1982) and *Jones v. Diamond,* 636 F.2d 1364, 1382 (5th Cir.), the court held that expert witness fees were taxable when witness' testimony was an important part of plaintiff's case. The court's reason for allowing the plaintiff to tax expert witness fees as costs in *Jones, supra,* and *Berry, supra,* should not be construed to deny a prevailing defendant from claiming expert witness fees as costs in a civil rights case. We feel that Congress did not intend to enact a law for a plaintiff and a different one for defendant. The court overrules plaintiff's objections to the taxation of cost for expert witness fees. In *Yarbrough v. Town of Ackerman, supra,* Judge Keady stated: "The final item in issue is the $4,986.71 claimed by plaintiffs for expenses incurred for engineering and technical assistance as absolutely necessary to the development of their case. While we view the awarding of such fees with caution, we are of the opinion that where, as here, the use of an expert is necessary to review, analyze, and criticize technical data clearly beyond the knowledge of lay citizens, an award of reasonable expert fees is proper. . . . We conclude, however, *that the costs to be taxed to defendants should be limited to that* portion of the expenses necessarily incurred by plaintiffs in order to properly develop their case as to the two areas of municipal services regarding which they obtained relief. *It is our view that $2,500 is a fair and reasonable amount allowable as costs for the expense of engineering and technical consultation with respect to these two areas of service."*

The court finds that the total sum of $11,807.16 is a fair and reasonable amount allowable as cost for expert witness fees of Dr. Haworth's testimony and preparation of said testimony. The amount of $11,807.16 is based upon the fee charged by the expert witness for professional services only. All other charges

for research assistance, travel, telephone, etc. are hereby excluded.

It is therefore

ORDERED

That costs are taxed as follows:

Fees of the marshal	$ 5.88
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	2,627.58
Fees for witnesses	199.25
Fees for exemplification and copies of papers necessarily obtained for use in case	111.00
Expert witness fees and expenses	11,807.16
Total	$14,750.87

This the 27th day of April, 1983.

NORMAN L. GILLESPIE

United States Magistrate

(2)

No. 86-328

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, CLC, and its LOCAL 5-376,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

JAMES E. YOUNGDAHL
YOUNGDAHL & YOUNGDAHL, P.A.
2101 Main Street
P.O. Box 6030
Little Rock, AR 72216
(501) 376-6355
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15pp

QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, reached the unanimous *result* that a prevailing defendant employer, in an action brought in good faith under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, is not entitled to be reimbursed by the non-prevailing plaintiffs for expert witness fees. Are there any "special and important reasons" for reviewing such *result*?

2. If the writ is granted, was the majority of the Court of Appeals correct in directing district courts under its supervision to deny to all prevailing *plaintiffs*, in litigation under civil rights statutes 42 U.S.C. §§ 1988 and 2000e-(k), reimbursement of expert witness fees beyond those specified in 28 U.S.C. § 1821 or provided under other narrow exceptions?

PARTIES TO THESE PROCEEDINGS

The correct name of the respondents in these proceedings, somewhat different from the representation in the Petition, is International Woodworkers of America, AFL-CIO, CLC, and its Local 5-376.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THESE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
SUPPLEMENTAL STATEMENT OF THE CASE	1
STATUTES INVOLVED	2
REASONS FOR DENYING THE WRIT	3
1. The Issues Raised by the Petition Have Been Resolved	3
2. If the Writ Is Granted, the Majority Decision of the Court of Appeals Includes a Direction to the District Courts Under Its Jurisdiction to Deny to Prevailing Plaintiffs, in Litigation Under Civil Rights Statutes, Reimbursement of Expert Witness Fees, a Direction Which Has Extremely Serious Consequences and Which Is Contrary to the Intention of Congress and the Practice Applied in Every Other Circuit	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 2, 5
Berkemer v. McCarty, 468 U.S. 420 (1984) 4
Blum v. Bacon, 457 U.S. 132 (1982) 4
Boykin v. Georgia-Pacific Corp., 706 F.2d 1384 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) 6
Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 2, 4, 5
City of Riverside v. Rivera, —— U.S. ——, 54 U.S.L.W. 4845 (6-24-86) 6
Dowdell v. City of Apopka, Fla., 698 F.2d 1181 (11th Cir. 1983) 6
Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) 4
Henkel v. Chicago, St. P., M. & O. Ry. Co., 284 U.S. 444 (1932) 3
Hensley v. Eckerhart, 461 U.S. 424 (1983) 5, 6
IBEW v. Foust, 442 U.S. 42 (1979) 7
International Woodworkers of America v. Champion Intl. Corp., 30 Empl. Prac. Dec. (CCH) ¶ 33,287 (N.D. Miss. 1982), affd., 732 F.2d 939 (5th Cir. 1984) 7
International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir., 1981), on remand, 34 Empl. Prac. Dec. (CCH) ¶ 34,324 (D. Md. 1984) 6
International Woodworkers of America v. Georgia-Pacific Corp., 568 F.2d 64 (8th Cir. 1977), on remand, sub nom. Powell v. Georgia-Pacific Corp., 535 F.Supp. 713 (W.D. Ark. 1980, 1982) 6
Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc), cert. dismissed, 453 U.S. 950 (1981) 4
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 6
Vaca v. Sipes, 386 U.S. 171 (1967) 7

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, et seq. i

TABLE OF AUTHORITIES—Continued

	Page
Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988	i, 2, 5
28 U.S.C. § 1821(a)(1)	2
28 U.S.C. § 1821(b)	3
28 U.S.C. § 1920(6)	3
42 U.S.C. § 2000e-(k)	i, 2
Other Material:	
Rule 54(d), Federal Rules of Civil Procedure	2
Youngdahl, Union Standing in Prosecution of Employment Discrimination Litigation: Questions of Class, 38 Ark. L. Rev. 24 (1984)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-328

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, CLC, and its LOCAL 5-376,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The respondents International Woodworkers of America, AFL-CIO, CLC, and its Local 5-376, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Fifth Circuit reported at 790 F.2d 1174 (5th Cir. 1986). In the alternative, if the writ is granted, the respondents seek reversal of the direction of the Fifth Circuit majority with respect to costs issues for prevailing plaintiffs in civil rights cases.

SUPPLEMENTAL STATEMENT OF THE CASE

A somewhat more impartial statement of the pre-appellate developments in the case than appears in the Petition for Writ of Certiorari appears in the per curiam

opinion of the Fifth Circuit panel. Petition, at B-2 to B-4.

In view of the unchallenged finding of the District Court that the lawsuit was not frivolous, unreasonable or unfounded, the panel applied *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), to deny to the prevailing defendant employer the expert witness fees in issue. On rehearing *en banc*, all judges agreed with the result, but an 11-4 majority took the occasion to overrule previous Fifth Circuit precedent and direct the district courts under its jurisdiction:

> that the fees of non-court-appointed expert witnesses are taxable by federal courts in non-diversity cases only in the amount specified by [42 U.S.C.] § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of the three narrow equitable exceptions recognized by *Alyeska* [*Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)] applies.

Petition, at A-13.

STATUTES INVOLVED

In addition to the provisions quoted by the Petition (28 U.S.C. § 1821(b) and Rule 54(d) of the Federal Rules of Civil Procedure), the following statutes also are involved:

> 28 U.S.C. § 1821(a)(1). Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> 42 U.S.C. § 1988. . . . [In any action under specified federal civil rights statutes including 42 U.S.C. § 1981] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> 42 U.S.C. § 2000e-(k). In any action or proceeding under this subchapter, the court, in its discretion,

may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

REASONS FOR DENYING THE WRIT

1. The Issue Raised by the Petition Has Been Resolved.

"Except as otherwise provided by law," 28 U.S.C. § 1821(a)(1) begins, "a witness . . . shall be paid the fees and allowances provided by this section." Such section currently establishes "an attendance fee of $30 per day." 28 U.S.C. § 1821(b).

Any question of special consideration for the fees of expert witnesses on the basis of the judicial code itself was resolved by *Henkel v. Chicago, St. P., M. & O. Ry. Co.*, 284 U.S. 444 (1932). The Court held that a plaintiff who prevailed in an action under the Federal Employers' Liability Act could not recover as costs additional fees for expert witnesses who testified at trial. Noting that specific statutory provisions as to the amounts taxable as witness fees had been enacted by Congress as early as 1799, the Court held that "when the Congress has prescribed the amount to be allowed as costs, its enactment controls." 284 U.S. at 446. Accordingly, the Court ruled that, apart from the witness fees allowable by statute, "additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts." *Ibid.*

Henkel has never been overruled or modified by the Supreme Court. The judicial code sections which deal with costs have been modified only in ways which support the *Henkel* result; in 1978, for example, "Compensation of *court appointed* experts" became taxable under 28 U.S.C. § 1920(6). Pub. L. 95-539, § 7, 92 Stat. 2044 (1978) (Emphasis added.)

Thus the very general question advanced by the Petition, whether "district courts possess discretion to award expert witness costs to the prevailing party in non-diversity cases" (Petition, at 7) (where, presumably, there is no question of other authorization from Congress), has been answered. Moreover, every judge of the district and appellate courts that have passed on this phase of this case has agreed that the petitioner is not entitled to the $11,807.16 (*see* Petition, at D-5) it still seeks.

The *result* below, in terms of either the broad or narrow concerns of the petitioner, does not present "special and important reasons" for granting the writ.

2. If the Writ Is Granted, the Majority Decision of the Court of Appeals Includes a Direction to the District Courts Under Its Jurisdiction to Deny to Prevailing Plaintiffs, in Litigation Under Civil Rights Statutes, Reimbursement of Expert Witness Fees, a Direction Which Has Extremely Serious Consequences and Which Is Contrary to the Intention of Congress and the Practice Applied in Every Other Circuit.

Although the result sought by the respondents was reached, the reasoning of the majority opinion of the Fifth Circuit is seriously harmful to other concerns of the respondents and will be contested if the writ is granted. *See Blum v. Bacon*, 457 U.S. 132, 137, n.5 (1982); *Berkemer v. McCarty*, 468 U.S. 420, 435, n.23 (1984).

Relying on previous Fifth Circuit decisions such as *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981), the District Court and the Fifth Circuit panel found the attorney's fee shifting provisions of federal civil rights statutes inclusive of expert witness fees. *See also Fairley v. Patterson*, 493 F.2d 598, 606, n.11 (5th Cir. 1974). Since, in the sense of *Christianburg*, the action had been "brought

in good faith and was neither frivolous, unreasonable nor without foundation," the claim of the prevailing defendant employer for expert witness fees must be denied. (It is not accurate, as stated by the *en banc* majority, that "the panel declined to reach the applicability of the [*Christianburg*] standard." Petition, at A-4. What it declined to reach was the question of expert fees as costs *if* the *Christianburg* good faith standard had *not* been met. Petition, at B-5.)

But by 1986 the *en banc* split of *Jones v. Diamond* had been reversed, and the new majority chose the instant case as a vehicle for stating a new rule, in the form of a direction to the district courts. As to all cases pending within the Fifth Circuit on June 2, 1986, "the fees of non-court appointed expert witnesses are taxable" only as any other costs or "when *expressly* authorized by Congress." Petition, at A-13. (Emphasis added.)

For the purposes of consideration of a writ here, the concurring opinion in the Fifth Circuit well states the reasons for error when such a direction is applied to civil rights cases. Petition, at A-14 to A-35.

First, the new rule is contrary to the intention of Congress, as described particularly during the enactment of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. Petition, at A-17 to A-18. *See also Hensley v. Eckerhart*, 461 U.S. 424, 433, n.7 (1983) (standards generally the same for fee awards under the 1976 Act and Title VII; the instant action was grounded on 42 U.S.C. § 1981 as well as Title VII). *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), is the prime source cited by the majority opinion, yet the 1976 congressional action was taken in response to the *Alyeska* result, and should receive plenary consideration.

Second, the new rule is contrary to that expressed by every other circuit. Petition, at A-20 to A-23. *See, e.g.*,

Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1188-92 (11th Cir. 1983).

Third, the new rule is destructive to the established concept of "private attorneys general," a significant element in the effectuation of national civil rights policy. *E.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). The costs of expert witnesses can be "staggering" (Petition, at A-34); the initial Bill of Costs here sought $31,468.87 for a single witness and her entourage. If they are not recoverable by prevailing civil rights plaintiffs, in most instances those costs must be paid out of attorney's fees. In such event, the now considerable body of law issued by this Court controlling the computation of attorney's fees may require new examination in light of the severe diminution effected by an additional obligation to pay the expert fees. *See Hensley v. Eckerhart, supra; City of Riverside v. Rivera*, —— U.S. ——, 54 U.S.L.W. 4845 (6-24-86) (law clerk costs awarded, but not appealed; 54 U.S.L.W. at 4846).

The respondent International Woodworkers of America has a particular interest in this last issue. In spite of relatively small size and resources, the IWA has conducted a successful program to enforce Title VII in the wood products industry. *See, e.g., International Woodworkers of America v. Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977), *on remand, sub nom. Powell v. Georgia-Pacific Corp.*, 535 F.Supp. 713 (W.D. Ark. 1980, 1982); *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259 (4th Cir. 1981), *on remand*, 34 Empl. Prac. Dec. (CCH) ¶ 34,324 (D. Md. 1984); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

The financial stresses of that program to effectuate federal civil rights law in employment contexts have been severe, but the IWA has managed to maintain it for about fifteen years. *See, e.g., International Woodworkers*

of America v. Chesapeake Bay Plywood Corp., supra, 34 Empl. Prac. Dec. at 33,275 ($15,193.98 in "expenses" properly payable); Youngdahl, *Union Standing in Prosecution of Employment Discrimination Litigation: Questions of Class*, 38 ARK. L. REV. 24, 32-38 (1984). If responsibility for expert witness fees is added to the burden even when the union prevails, its practical ability to continue the program is, at least, in jeopardy. For recognition by this Court of the financial problems of far larger labor organizations, *compare IBEW v. Foust*, 442 U.S. 42, 50-51 (1979); *Vaca v. Sipes*, 386 U.S. 171, 197 (1967).

In a sense, prior proceedings in this very case illustrate the practical problem. The face of the opinion on the merits by the District Court, and the comments of the court during trial, indicated that if the plaintiffs had produced a countervailing expert they could have prevailed. *International Woodworkers of America v. Champion Intl. Corp.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,287 (N.D. Miss. 1982), *affd.*, 732 F.2d 939 (5th Cir. 1984). The reason none was produced was because of the initial outlay of money thereby required. Reconsideration of that probably mistaken tactical decision by the plaintiffs would be made unlikely for future cases in the Fifth Circuit, under the direction of the majority here.

In sum, a portion of the decision of the Fifth Circuit in this case, when applied to litigation under federal civil rights statutes, is contrary to the intention of Congress, contrary to the practice applicable in all other circuits, and a severe impediment to enforcement of the civil rights policy of the nation.

CONCLUSION

The respondents oppose the writ because the result below was correct.

However, if a writ is granted, the direction of the Fifth Circuit concerning expert witness fees for prevailing plaintiffs in civil rights cases should be reversed.

Respectfully submitted,

JAMES E. YOUNGDAHL
YOUNGDAHL & YOUNGDAHL, P.A.
2101 Main Street
P.O. Box 6030
Little Rock, AR 72216
(501) 376-6355
Counsel for Respondents

No. 86-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO-CLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

STEVEN L. WINTER
University of Miami
School of Law
P.O. Box 248087
Coral Gables, Florida 33124-8087

Attorneys for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

*Counsel of Record

QUESTION PRESENTED

May expert witness fees and expenses be included as part of an award of attorneys' fees under the Civil Rights Attorneys' Fees Act of 1976 and other fee-shifting statutes?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Interest of Amicus	1
ARGUMENT	3
I. INTRODUCTION	3
II. THE QUESTION OF WHETHER EXPERT WITNESS FEES AND OTHER EXPENSES MAY BE RECOVERED UNDER THE ATTORNEYS' FEES STATUTES IS OF NATIONAL IMPORTANCE	6
III. CONGRESS INTENDED THAT EXPERT WITNESS FEES AND OTHER NECESSARY COSTS OF LITIGATION BE RECOVERABLE AS PART OF ATTORNEYS' FEES	11
Conclusion	26

TABLE OF AUTHORITIES

Cases: Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 13, 20

Bazemore v. Friday, 478 U.S. ___, 92 L.Ed.2d 315 (1986) 9

Bradley v. School Bd. of City of Richmond, 53 F.R.D. 28 (E.D. Va. 1971) 21

Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) . 2

Cannon v. University of Chicago, 441 U.S. 677 (1979) 24, 25

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 2, 6, 25

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 16

Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974) 21,22

Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) 12, 20

Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963) . . . 17

Hensley v. Eckerhart, 461 U.S. 424 (1983) 2

Hughes v. Rowe, 449 U.S. 5 (1980) . . . 25

Hutto v. Finney, 437 U.S. 678 (1978) . 2

Jones v. Diamond, 636 F.2d 1364 (5th Cir. (en banc), cert. granted sub nom. Ledbetter v. Jones, 452 U.S. 959, amended, 453 U.S. 911, cert. dismissed, 453 U.S. 950 (1981) 4, 7, 11

Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971) 21

La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) 20

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 2

Rios v. Enterprise Ass'n Steamfitters Local, 400 F. Supp. 993 (S.D.N.Y. 1975), aff'd, 542 F.2d 579 (2d Cir. 1976) 21

Sabala v. Western Gillette, Inc., 371 F. Supp. 385 (S.D. Tex. 1974), aff'd in part, rev'd in part on other grounds, 516 F.2d 1251 (5th Cir. 1975), rev'd on other grounds, 431 U.S. 951 (1977) 20, 21

Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) . . . 16

Sledge v. J.P. Stevens, 12 E.P.D. þ11,047 (E.D.N.C. 1976) 21

Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974) 22

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) 9

Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975) 22, 23

Tennessee v. Garner, 471 U.S. ___, 85 L.Ed.2d 1 (1985) 9

Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25 (1986) 9, 16

Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598 (1986) 9

Welsch v. Likins, 68 F.R.D. 589 (D. Minn.) aff'd, 525 F.2d 987 (8th Cir. 1975) 20

Zuber v. Allen, 396 U.S. 168 (1969) . . 16

Statutes:

Civil Rights Attorneys Fees Act of 1976 . . . . . passim

42 U.S.C. §1988 . . . . . passim

28 U.S.C. §1821 5

Other Authorities:

Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 94th Cong., 1st Sess. (1975) 14, 15

The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on

Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93 Cong., 1st Sess. (1973) 13, 14

122 Cong. Rec. H 12150 (daily ed., Oct. 1, 1976) 19

122 Cong. Rec. H 12155 (daily ed., Oct. 1, 1976) 17, 24

122 Cong. Rec. H 12159-12160 (daily ed., Oct. 1, 1976) 19

122 Cong. Rec. H 12165 (daily ed., Oct. 1, 1976) 24

122 Cong. Rec. S 16252 (daily ed., Sept. 21, 1976) 17

H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) 17

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) 15

No. 86-328

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO-CLC,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

INTEREST OF AMICUS [1]

[1] Letters consenting to the filing of this brief have been lodged with the Clerk of Court.

The NAACP Legal Defense and Educational Fund, Inc. has been in the forefront of civil rights litigation for many years. As part of that effort we have had a long standing interest in the award of attorneys' fees and costs adequate to ensure an appropriate level of private enforcement of the civil rights statutes. Thus, we have appeared as counsel or as amicus curiae in most of the leading civil rights attorneys' fees cases.[2]

As we explain below, this case involves a vitally important issue--whether litigation costs essential to the adequate representation of civil rights

---

[2] E.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Hutto v. Finney, 437 U.S. 678 (1978); Hensley v. Eckerhart, 461 U.S. 424 (1983).

plaintiffs are recoverable as part of an award of attorneys' fees under 42 U.S.C. § 1988. Amicus has a direct interest in the question since its ability to carry out its program will be seriously jeopardized if it cannot recover the often substantial expert witness fees and other costs it must expend in representing its clients.

ARGUMENT

I.

INTRODUCTION

Even though the judgment below was in favor of the civil rights plaintiff, amicus NAACP Legal Defense and Educational Fund, Inc., supports the grant of a writ of certiorari in this case because the erroneous legal ruling of the Fifth Circuit threatens to cripple civil rights enforcement in that circuit in direct contravention of the manifest intent of Cognress. The en banc court below

properly rejected the position taken by petitioner that a prevailing defendant in a civil rights case should be awarded costs of expert witnesses as part of their ordinary costs of litigation. But, it reached that conclusion as a result of a demonstrably incorrect and potentially devastating line of reasoning: that expert witness fees are never available in civil rights cases as part of an award of attorneys' fees under 42 U.S.C. § 1988 or any other federal fee-shifting statute. As we demonstrate below, this holding flies in the face of the extensive and clear legislative history of § 1988. If left standing, this en banc directive to the district courts in the circuit to disregard the prior decision in Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981),

will cripple civil rights enforcement.[3]

In sum, because of the importance of the availability of reimbursement for expert witness fees to the enforcement of the civil rights statutes, we urge that the Court grant the petition for writ of certiorari and affirm the district court's denial of costs on the following grounds: 1) Expert witness fees and related costs are not ordinarily recoverable under 28 U.S.C. § 1821; 2) such fees may, however, be recovered as part of an award of attorneys' fees under the civil rights statutes; 3) civil rights defendants, therefore, may recover such fees only if

---

[3]Because there were narrower grounds to support its judgment, the broader ruling of the Fifth Circuit was both incorrect and unnecessary to the disposition of the issue before it. Despite the fact that the Fifth Circuit's opinion is technically dicta, there is the very real prospect that the lower courts in that circuit will feel bound by its reasoning.

the standards of Christiansburg Garment Company v. EEOC, 434 U.S. 412 (1978), are met; 4) the district court was correct when it held that Christiansburg was not satisfied because this action was not frivolous, unreasonable, or without foundation, nor was it brought in bad faith.

II.

THE QUESTION OF WHETHER EXPERT WITNESS FEES AND OTHER EXPENSES MAY BE RECOVERED UNDER THE ATTORNEYS' FEES STATUTES IS OF NATIONAL IMPORTANCE.

As the petition for a writ of certiorari correctly notes, there has been extensive litigation in the lower federal courts over whether and under what circumstances expert witness fees and other costs not specifically enumerated in the cost provisions of Title 28 of the United States Code may be recovered under the civil rights attorneys' fees statutes. The petitioner also correctly notes that

the decision of the court below is in square conflict with decisions of other courts of appeals and, indeed, repudiates a prior en banc decision of the Fifth Circuit itself that this Court accepted for review.[4]

The question presented is of the utmost importance for the enforcement of the civil rights statutes. But fortunately its difficulty is not proportionate to its importance. As demonstrated in Part III below, the various attorneys' fees provisions in the federal civil rights laws were enacted precisely because Congress knew that, without fee shifting that included expert witness fees, private plaintiffs would be unable to bring civil rights cases.

---

[4]Jones v. Diamond, 636 F.2d 1364 (5th Cir.) (en banc), cert. granted sub nom. Ledbetter v. Jones, 452 U.S. 959, amended, 453 U.S. 911, cert. dismissed, 453 U.S. 950 (1981).

Accordingly, Congress acted to make effective the private enforcement of the civil rights statutes without which the eradication of discrimination and other constitutional violations could not be achieved.

This Congressional wisdom has become more prophetic as civil rights litigation has become more complex, and more costly. In addition to actual attorneys' fees, out-of-pocket costs have grown to be far beyond the resources of litigants and those few private organizations dedicated to the enforcement of civil rights. In particular, expert witness fees and related expenses have consumed an increasingly large proportion of the costs of successfully litigating civil rights claims. As this Court itself has noted, expert witness testimony is often essential in employment discrimination

cases,[5] voting rights cases,[6] school desegregation cases,[7] jury discrimination cases,[8] and police practices cases,[9] to name but five categories. Proof of discrimination and the development of adequate records has involved the use of statisticians, labor economists, historians, and other experts. Expert testimony requires not only the cost of the time of the witness but significant costs in developing the data and other evidence on which their testimony is based. In a complex Title VII case, for

---

[5]Bazemore v. Friday, 478 U.S. ___, 92 L.Ed.2d 315, 329-31 (1986).

[6]Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25, 48 (1986).

[7]Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 9-10 (1971).

[8]Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 606 (1986).

[9]Tennessee v. Garner, 471 U.S. ____, 85 L.Ed.2d 1, 14 (1985).

example, it is essential to develop and effectively present statistical evidence. This requires assembling data, converting it to computer readable form, development of statistical programs, the analysis and preparation of reports and exhibits, and the presentation of testimony. It has been amicus' experience that, with few exceptions, Title VII class actions require out-of-pocket expenditures of at least $100,000 in order to prepare and present them adequately.

Costs of this magnitude are as much beyond the means of civil rights plaintiffs as are legal fees themselves. Under the decision of the Fifth Circuit, however, such costs, regardless of how necessary they are to the successful conduct of a case, may not be recovered because they are not enumerated in any statute or rule. The necessary result

will be that civil rights enforcement will be crippled because plaintiffs, their attorneys, and organizations with limited budgets will be faced with the inability to recover such expenses even when they are fully vindicated on the merits. As we will now demonstrate, this result is wholly at odds with the express intention of Congress when it enacted the Civil Rights Attorney's Fees Act of 1976.

III.

CONGRESS INTENDED THAT EXPERT WITNESS FEES AND OTHER NECESSARY COSTS OF LITIGATION BE RECOVERABLE AS PART OF ATTORNEYS' FEES.

The opinion of the court below is based on a wholly erroneous reading of the legislative history of the 1976 Fees Act. The court relied on the dissent in Jones v. Diamond, 636 F.2d at 1391 to the effect that there was "only . . . a single sentence from 'a Senate Report concerning legislation which could have contained ...

a provision [authorizing the award of excess expert witness' fees as costs] but did not.'" 790 F.2d at 1180, (emphasis in original). Nothing could be further from the truth: the entire legislative history of the Fees Act is permeated with the concern for the problem of expert witness fees and clearly reflects their inclusion within the fee shifting scheme of the Act. This concern was reflected at the hearings and in the debates; it was addressed by the use of statutory language designed to incorporate the prior case law that included expert witness fees "in the concept of attorneys' fees." Fairley v. Patterson, 493 F.2d 598, 606 n. 11 (5th Cir. 1974).

At the hearings that led to the Fees Act, Congress repeatedly heard that the economic deterrents to civil rights enforcement, and public interest

litigation generally, included both the problems of attorneys' fees and the great expense of expert testimony. Each of the first three witnesses in the 1973 Senate hearings raised this problem. One of these was Dennis Flannery, plaintiffs' counsel in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). He testified "that in a difficult case it cost tens of thousands of dollars to be able to conduct the case including being able to get expert witnesses...." The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93 Cong., 1st Sess. 1108 (1973). (Statement of Senator Tunney the chairman of the subcommittee and later the sponsor of the Fees Act, summarizing testimony.) See also id. at 832-34

(Flannery statement); id. at 799 (Statement of J. Anthony Kline); id. at 1127-28 (Remarks of Senator Tunney).

This record was repeated in the House. One witness testified about a party having "to confine its activities to cross-examination of industry witnesses because it could not possibly afford to put on expert witnesses of its own...." Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the Comm. on the Judiciary, House of Representative, 94th Cong., 1st Sess. 159 (1975). (Statement of Peter H. Schuck, Consumers Union, Inc.) The Lawyers' Committee on Civil Rights testified that civil rights cases were not being filed because counsel "are rarely able to afford the technical assistance of expert witnesses...." Id. at 89, 100 (Statement

of Armand Derfner and Mary Frances Derfner). One witness went so far as to state that if expert witness fees were not included, "the very point of the bills may be defeated." Id. at 136 (Statement of John M. Ferren).

Congress responded by crafting a bill that used the precise language of Titles II and VII and that intentionally adopted the prior case law under these statutes and the "private attorney general" theory. As explained in the Senate Report:

> S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3 (b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. §1973ℓ(e).... It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.

S. Rep. No. 94-1011, 94th Cong., 2d Sess.

2, 4 (1976).[10] Senator Kennedy, one of the sponsors of the bill,[11] further indicated that the bill "is intended simply to expressly authorize the courts to continue to make the kinds of awards of

---

[10] The importance of the committee report in establishing congressional intent is well established: "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969); Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25, 42 n.7 (1986).

[11] In Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), this Court noted that: "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Id. at 394-95. More recently, in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), this Court explained that: "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history ... [but] must be considered with the Reports of both Houses and the statements of other Congressmen...." Id. at 311. Since Senator Kennedy's remarks as sponsor are wholly consistent with and complementary to the bulk of the legislative history, they possess added weight.

legal fees that they had been allowing prior to the Alyeska decision." 122 Cong. Rec. S 16252 (daily ed., Sept. 21, 1976).[12]

During the floor debate on the House side, Congressman Drinan, the bill's sponsor [13] and the author of the committee report, [14] amplified on the comments in that report. See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 5-6 (1976).

The purpose of S.2278 -- and its

---

[12] In the House, both Representatives Railsback and Bolling noted that the bill merely codified and restored the pre-Alyeska law. 122 Cong. Rec. H 12154; 12155 (daily ed., Oct. 1, 1976).

[13] See n. 11, supra.

[14] Mr. Drinan's exposition is especially authoritative since he was a member "of the House Judiciary Committee responsible for . . . [these] matters, author and chief sponsor of the measure under consideration, and a respected congressional leader in the whole area . . . ." Foti v. Immigration and Naturalization Service, 375 U.S. 217, 223 n. 8 (1963).

House counterpart, H.R. 15460 -- is to authorize the award of a reasonable attorney's fee in actions brought in State or Federal courts, under certain civil rights statutes . . . . By permitting fees to be recovered under those statutes, we seek to make uniform the rule that a prevailing party, in a civil rights case, may, in the discretion of the court, recover counsel fees.

The Civil Rights Attorney's Fees Awards Act of 1976, S. 2278 (H.R. 15460) is intended to restore to the courts the authority to award reasonable counsel fees to the prevailing party in case initiated under certain civil rights acts. The legislation is necessitated by the decision of the Supreme Court in Alyeska Pipeline Service Corp. against Wilderness Society, 421 U.S. 240 (1975) . . . .

The language of S. 2278 tracks the wording of attorney fee provisions in other civil rights statutes such as section 706(k) of Title VII -- employment -- of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application. . . . These evolving standards should provide sufficient guidance to the courts in construing this bill which uses the same term. I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel,

> including all incidental and necessary expenses incurred in furnishing effective and competent representation.

122 Cong. Rec. H 12159-12160 (daily ed., Oct. 1, 1976) (emphasis added).

Congressman Drinan's comments are particularly important for two reasons. First, they indicate the explicit intent of Congress to adopt the existing case law under Title VII.[15] More importantly, they indicate that Congress was conscious that expert witness fees and other out-of-pocket expenses had been recoverable even though they were not traditional "costs." Rather, these non-statutory costs had been treated in just the way Congressman Drinan explained:

> Costs not subsumed under federal statutory provisions normally

---

[15]Representative Anderson, one of the floor managers of the bill, also made this point at the opening of the floor debates. 122 Cong. Rec. H 12150-51 (daily ed., Oct. 1, 1976).

> granting such costs against the adverse party . . . are to be included in the concept of attorneys' fees.

Fairley v. Patterson, 493 F.2d 598, 606 n. 11 (5th Cir. 1974) (emphasis added).

In 1976, when Congress debated and passed the Act, there was little doubt that expert witness fees had been recoverable under the "private attorney general" cases[16] and under the attorneys'

---

16 It is significant that § 1988 was the legislative response to Alyeska; it was in the pre-Alyeska civil rights cases that expert witness fees were most consistently awarded. Fairley v. Patterson, 493 F.2d 598, 606 n. 11 (5th Cir. 1974) (costs of preparing reapportionment plan in voting rights case); Welsch v. Likins, 68 F.R.D. 589, 596-97 (D. Minn.) aff'd, 525 F.2d 987 (8th Cir. 1975) (§1983 suit on rights of mentally retarded); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part on other grounds, rev'd in part on other grounds, 516 F.2d 1251 (5th Cir. 1975), rev'd on other grounds, 431 U.S. 951 (1977) (employment discrimination suit under Title VII and §1981: attorneys' and expert witness fees awarded under both Title VII and "private attorney general" theory); La Raza Unida v. Volpe, 57 F.R.D. 94, 102

fees provision of Title VII on which the Act was modeled.[17] Indeed, the award of expert witness fees to the prevailing party in Title VII litigation was so well established that it often went unchallenged. Davis v. County of Los Angeles, 8 E.P.D. ¶9444, p. 5048 (C.D. Cal. 1974) ("These charges were not challenged by defendants and are

---

(N.D. Cal. 1972); Bradley v. School Bd. of City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971)(school desegregation); Jones v. Wittenberg, 330 F. Supp. 707, 722 (N.D. Ohio 1971)(jail case).

[17] Rios v. Enterprise Ass'n Steamfitters Local, 400 F. Supp. 993, 997 (S.D.N.Y. 1975), aff'd, 542 F.2d 579 (2d Cir 1976); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part, rev'd in part on other grounds, 516 F.2d 1251 (5th Cir. 1975), rev'd on other grounds, 431 U.S. 951 (1977). See also Sledge v. J.P. Stevens, 12 E.P.D. ¶11,047 (E.D.N.C. 1976) (prospective award of fees for plaintiffs' expert necessitated by defendants' computerized records).

valid").[18]

The Senate left little doubt about the case law it intended to incorporate:

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep. No. 94-1101, supra, at 6. These cases were carefully chosen to include both statutory -- Davis and Swann, supra, -- and non-statutory "private attorney general" -- Stanford Daily, supra, -- fee awards and to include a broad range of attorneys' fee issues including the recoverability of expert witness fees and

---

[18] Research reveals no reported pre-1976 Title VII cases in which expert witness fees were discussed and disallowed.

paralegal and out-of-pocket expenses. Indeed, of these three paradigmatic cases, two involved the award of substantial expert witness fees -- Davis, noted above, and Swann.[19]

Thus, there can be little doubt that Congress acted deliberately and intentionally to incorporate an existing body of case law which clearly allowed for the inclusion of expert witness fees and all manner of reasonable out-of-pocket expenses[20] as part of "fees and costs."

---

[19] Amicus was of counsel in Swann. Of the $23,972.33 in costs awarded by the district court, over one third was for expert witness fees and expenses.

[20] Even the bill's opponents understood this, as Congressman Bauman of Maryland made clear in his statement on the floor.

> I agree that people ought to have their rights vindicated, but could we not imagine a situation in which a so-called public interest lawyer, who may be financed independently, would be inclined to file a suit not only to test a legal point but also in the

The decision below ignored this extensive and clear legislative history. It also appears to have applied a "plain meaning" or "clear statement" rule requiring that Congress express its intent in the plain language of the statute. This rule has no basis in the case law; to the contrary, in the civil rights and fee areas, the Court has recognized as appropriate an approach to legislative drafting that deliberately adopts the wording of earlier statutes in order to incorporate by reference the existing case law. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979)

---

hope that the court would grant his client plaintiffs' legal fees, and therefore his expenses?

122 Cong. Rec. H 12165 (daily ed., Oct. 1, 1976). As phrased by a supporter, Congressman Seiberling: "All we are trying to do in this bill is ... to get compensation for their legal expenses in meritorious cases." Id. at H 12155.

(implied cause of action under Title IX); Hughes v. Rowe, 449 U.S. 5 (1980); Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) (higher standard for award of fees to prevailing defendant).

> The drafters ... explicitly assumed that it would be interpreted and applied as [these provisions] had been during the preceding [twelve] years.... It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to [these provisions and the case law], we are especially justified in presuming both that those representatives were aware of the prior interpretation ... and that that interpretation reflects their intent.

Cannon v. University of Chicago, 441 U.S. at 696-98. Congress deliberately incorporated expert witness fees into the fee shifting scheme of the Act by incorporating the prior case law. That decision should be respected.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

STEVEN L. WINTER
University of Miami
School of Law
P.O. Box 248087
Coral Gables, Fla. 33124-8087

Attorneys for Amicus Curiae
NAACP Legal Defense and
Educational Fund, Inc.

*Counsel of Record

No. 86-328

In The
Supreme Court of the United States
October Term, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 5-376,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Miles Curtiss McKee*
Jeffrey A. Walker

Fuselier, Ott, McKee & Walker, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether in non-diversity cases federal courts may tax as costs the fees of expert witnesses in excess of the amount set forth in 28 U.S.C. § 1821.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are Champion International Corporation, the International Woodworkers of America, AFL-CIO, and its Local 5-376.*

---

*There are no parent companies, subsidiaries or affiliates of Champion International Corporation required for listing by Rule 28.1.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Summary of Argument	5
Argument	6
RULE 54(d) INCORPORATES THE LONG-STANDING RULE IN EQUITY THAT FEDERAL COURTS POSSESS INHERENT AUTHORITY TO TAX NONSTATUTORY EXPENSES AS COSTS	6
NONSTATUTORY COSTS SUCH AS EXPERT WITNESS FEES ARE TAXABLE WHERE THE TRIAL COURT FINDS THAT THE COSTS WERE NECESSARILY INCURRED FOR THE COURT'S PROPER DETERMINATION OF THE CASE	8
EXPERT WITNESS COSTS ARE TAXABLE FOR AND AGAINST ALL FEDERAL LITIGANTS	10
Conclusion	13

TABLE OF AUTHORITIES

Page(s)

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 9

Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983) 11

Baez v. Department of Justice, 684 F.2d 999 (D.C. Cir. 1982) 12

Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) 11

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) ... 11

Ex parte Peterson, 253 U.S. 300 (1920) 6

Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964) 5, 7, 9, 10

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) 8

Harris v. Twentieth Century-Fox Film Corp., 139 F.2d 571 (2d Cir. 1943) 7

Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway, 284 U.S. 444 (1932) 7

Marek v. Chesney, 105 S.Ct. 3012 (1985) 8

Paschall v. Kansas City Star Co., 695 F.2d 322 (8th Cir. 1982), *rev'd on other grounds en banc*, 727 F.2d 692 (8th Cir.), *cert. denied*, 105 S.Ct. 222 (1984) 8

Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201 (3d Cir. 1981) 9

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 6, 9

Shakey's, Inc. v. Covalt, 704 F.2d 426 (9th Cir. 1983) ... 8

Smith v. American Service Co., 38 Fair Empl. Prac. Cas. 377 (N.D. Ga. 1985) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 6

Welsch v. Likins, 68 F.R.D. 589 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975) (per curiam) 9

Woodworkers v. Champion International Corp., 30 Empl. Prac. Dec. (CCH) ¶ 33,287 (N.D. Miss. (1982), *aff'd*, 732 F.2d 939 (5th Cir. 1984) (per curiam) 3

Rule 54(d), Federal Rules of Civil Procedure 2, 4, 5, 6, 7, 8, 10, 11, 12, 13

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1821(b) 2, 4

42 U.S.C. § 1981 3

42 U.S.C. § 2000e *et seq.* 3, 12

1948 United States Code Congressional Service 1887-88 (80th Cong., 2d Sess.) 7

4 C. Wright & A. Miller, Federal Practice & Procedure § 1004 (1969) 6

10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2665 (2d ed. 1983) 7

No. 86-328

In The
Supreme Court of the United States
October Term, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 5-376,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Petition Appendix A) is reported at 790 F.2d 1174 (5th Cir. 1986 (en banc). The panel opinion of the court of appeals (Petition Appendix B) is reported at 752 F.2d 163 (5th Cir. 1985) (per curiam). The unreported opinion of the district court is reproduced in Petition Appendix C. The unreported decision of the district court's magistrate is reproduced in Petition Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1986. The petition for a writ of certiorari was docketed in this Court on August 29, 1986. The petition was granted on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1821(b) provides:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fees for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

STATEMENT OF THE CASE

The International Woodworkers of America, AFL-CIO, and its Local 5-376 ("IWA") sued Champion International Corporation ("Champion") alleging violations of Title VII of the Civil Rights Act of 1964, *as amend-*

ed, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Three Champion employees subsequently were allowed to intervene as plaintiffs and ultimately were certified as representatives of a class.

After a trial, which centered upon testimony offered by an expert witness hired by Champion, the district court rejected the claims of the IWA, all other plaintiffs and the class. *Woodworkers v. Champion International Corp.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,287 (N.D. Miss. 1982), *aff'd*, 732 F.2d 939 (5th Cir. 1984) (per curiam). A judgment was entered the same day assessing all costs against the IWA.

Champion thereafter filed a bill of costs, which included a request for expert witness fees, and a motion for allowance of the company's attorneys' fees as a part of the costs of the case. The district court denied Champion's motion for attorneys' fees. All other costs questions, including the request for the expert witness fees, were referred to a magistrate.

In light of substantial local district authority approving the practice in some circumstances, the magistrate taxed the IWA with a portion of Champion's expert witness fees. The IWA appealed the magistrate's decision to the district judge.

The district judge reversed the magistrate's holding and, instead, followed what he believed to be the "normal civil litigation rule [that] disallows excess fees for expert witnesses." More specifically, the district judge construed existing Fifth Circuit decisions as precluding the taxing of expert witness costs to the prevailing party, except in cases where the losing litigant had proceeded

in bad faith or where the prevailing party is a civil rights plaintiff. The local district authority relied upon by the magistrate to support his decision was expressly overruled. Champion appealed the decision.

A panel of the court of appeals affirmed the district judge's decision that prevailing defendants in non-frivolous civil rights actions may recover expert witness costs only under standards established by this Court's civil rights attorneys' fees decisions. The panel further held that an indispensable-to-the-case standard for taxing expert witness costs found in some Fifth Circuit decisions should not be extended to civil rights cases.

On rehearing en banc, the court of appeals rejected the theories of the magistrate, the district judge and the panel. The majority held that, absent bad faith or a statute expressly authorizing such an award, no federal non-diversity litigant may recover expert witness costs in excess of the amount provided for in 28 U.S.C. § 1821. Rule 54(d) of the Federal Rules of Civil Procedure was construed as providing discretion only to disallow expenses otherwise expressly provided by statute rather than as a procedural acknowledgement of district courts' inherent equitable power to allow expenses. The court of appeals expressly overruled its prior opinions purporting to recognize exceptions for prevailing civil rights plaintiffs and in those instances where the expert witness was indispensable to a proper determination of the case.

———o———

SUMMARY OF ARGUMENT

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, nonstatutory costs such as expert witness fees could be taxed as costs in equity cases. Rule 54(d) incorporated the practice in equity and, thus, the term "costs," as used in Rule 54(d), may include, in the sound equitable discretion of the district court, expert witness fees.

District court discretion to tax expert witness costs pursuant to Rule 54(d) should be triggered by the trial court's conclusion that the expert witness was necessary to a proper determination of the case. The American Rule does not prohibit such considerations and a fair reading of *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), compels the conclusion that a functional analysis, rather than the court of appeals' wooden approach, is appropriate for nonstatutory costs issues.

A litigant's status as a Title VII defendant does not automatically disqualify it from the district court's Rule 54(d) discretion to tax expert witness fees as costs. The same equitable discretion which permits such awards clearly permits district courts to decline an otherwise appropriate award on the basis of the losing party's inability to pay. Moreover, Rule 54(d) should be interpreted uniformly both between parties and among the various causes of action heard by federal courts if the inconsistent and contradictory state of the law which currently exists with respect to expert witness costs is to be avoided in the future.

ARGUMENT

I.

RULE 54(d) INCORPORATES THE LONG-STANDING RULE IN EQUITY THAT FEDERAL COURTS POSSESS INHERENT AUTHORITY TO TAX NONSTATUTORY EXPENSES AS COSTS.

In defining the term "costs," this Court has uniformly relied upon "the contemporaneous understanding of the term." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980). Rule 54(d), therefore, should be construed to have incorporated the common understanding of costs at the time of the adoption of the Federal Rules of Civil Procedure in 1938. *See generally* 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1004 (1969).

There is no question, at least in equity cases, that nonstatutory litigation expenses were considered potential taxable costs prior to the adoption of the federal rules. This Court recognized long ago that "[t]he allowance of costs in the federal courts rests, not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes." *Ex parte Peterson*, 253 U.S. 300, 315 (1920). "Plainly the foundation for the historic practice of granting reimbursement for the cost of litigation other than [statutory] costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939).

The contemporaneous understanding of Rule 54(d)'s reference to "costs" thus contemplated the taxing of nonstatutory costs at least in some circumstances in equity

cases. Moreover, as noted in Judge Rubin's opinion below, substantial authority exists for the proposition that Rule 54(d) specifically incorporated the costs practices of equity. *Petition Appendix* at A-29, *citing Harris v. Twentieth Century-Fox Film Corp.*, 139 F.2d 571, 571 n.1 (2d Cir. 1943); 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2665, at 171 (2d ed. 1983).

The adoption of the Federal Rules of Civil Procedure and Rule 54(d)'s incorporation of the costs practices in equity more than adequately explain the differences between *Henkel v. Chicago, St. P., M. & O. Rwy.*, 284 U.S. 444 (1932), and *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), which, at first blush, appear to embody irreconcilable views of nonstatutory costs. *Henkel*, decided before adoption of the federal rules, properly found that expert witness fees were not taxable "in a law case." 284 U.S. at 445. *Farmer*, decided after adoption of the federal rules and the merger of law and equity, correctly focused on the limits of "the discretion given district judges to tax costs . . . not specifically allowed by statute" afforded by Rule 54(d). 379 U.S. at 235.

The court of appeals construed the "except where express provision therefor is made either in a statute of the United States or in these rules" language of Rule 54(d) to be a limitation upon the power of federal courts to tax costs beyond those specifically enumerated by statute. As Judge Rubin's opinion below noted, such a construction is foreclosed by the expressed "permissive" intent of the framers of the rules. *Petition Appendix* at A-27, *citing 1948 United States Code Congressional Service* 1887-88 (80th Cong., 2d Sess.). The fact of the matter is that the term "costs" is not defined anywhere by the federal rules

and, therefore, "varying definitions of 'costs,'" *Marek v. Chesny*, 105 S. Ct. 3012, 3017 (1985), may be applied to Rule 54(d). Only the most contorted reading of Rule 54 (d) escapes the plain meaning of the proviso: district courts possess discretion to award costs except where Congress has expressly prohibited such an award. *See, e.g., Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (statutory prohibition of costs award against veterans in reemployment suits).

Accordingly, Champion submits that it is beyond reasonable dispute that at least some discretion to tax nonstatutory costs such as expert witness fees exists under Rule 54(d). The more important debate concerns the circumstances under which trial courts may properly exercise their Rule 54(d) discretion.

II.

NONSTATUTORY COSTS SUCH AS EXPERT WITNESS FEES ARE TAXABLE WHERE THE TRIAL COURT FINDS THAT THE COSTS WERE NECESSARILY INCURRED FOR THE COURT'S PROPER DETERMINATION OF THE CASE.

Champion submits that trial courts possess the inherent equitable discretion to award nonstatutory costs such as expert witness fees to the prevailing party in cases where the court finds that the costs were necessarily incurred for the court's proper determination of the case. *See, e.g., Shakey's, Inc. v. Covalt*, 704 F.2d 426, 437 (9th Cir. 1983) ("essential to establish the defense"); *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 339 (8th Cir. 1982) ("'crucial or indispensable'") (citation omitted), *rev'd on other grounds*, 727 F.2d 692 (8th Cir.) (en banc), *cert.*

denied, 105 S. Ct. 222 (1984); *Roberts v. S. S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3d Cir. 1981) ("indispensable to determination of the case"). "The inherent powers of federal courts are those which 'are necessary to the exercise of all others.' " *Roadway Express, Inc. v. Piper*, 447 U.S. at 764 (citation omitted). When a district judge determines that the case could not have been properly decided without the expert testimony, the court should be permitted to exercise its sound equitable discretion to apportion the costs of presenting such testimony.

The touchstone is the benefit to the court. In virtually every decision holding that district courts possess discretion to tax expert witness costs, the reason cited is the critical importance *to the court* of the expert witness' testimony. *See, e.g., Welsch v. Likins*, 68 F.R.D. 589, 597 (D. Minn.) ("expert witnesses were an indispensable part of this trial [enabling] the court to fashion not only necessary but practical requirements. . . ."), *aff'd*, 525 F.2d 987 (8th Cir. 1975) (per curiam).

Therein lies the distinction, in Champion's view, between attorneys' fees decisions, such as *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and the instant case. Attorneys' fees clearly fall within the American Rule's general prohibition of taxing traditional client-solicitor costs. *Id.* at 255-59. Expert witness costs, while ultimately benefiting the prevailing party, in some cases assume an added dimension, separate and apart from partisan advantage, which uniquely benefits the trial court. In this limited circumstance, Champion submits that the sound discretion of the district judge must be respected.

The distinction also underscores the court of appeals' mistaken disregard of *Farmer*. The *Farmer* opinion need

not be stood "on its head," as the court of appeals argued, to appreciate the choice of words utilized by this Court to decline the invitation in that case categorically to forbid the taxing of all nonstatutory witness costs. "We cannot accept . . . Farmer's argument that a federal district court can never under any circumstances tax as costs [nonstatutory witness] expenses. . . . " *Farmer v. Arabian American Oil Co.*, 379 U.S. at 232. The *Farmer* opinion clearly disavows the wooden approach taken by the court of appeals in the instant case and, instead, recommends a functional scrutiny of nonstatutory costs, a functional analysis which Champion submits should focus upon the importance of the testimony to the trial court's proper determination of the case.

III.

EXPERT WITNESS COSTS ARE TAXABLE FOR AND AGAINST ALL FEDERAL LITIGANTS.

As noted earlier, Rule 54(d) does not define the term "costs." Consequently, no distinction whatsoever is made between plaintiffs and defendants or among particular causes of action. While there is no question that Congress intended to encourage the filing of certain types of lawsuits, such as Title VII actions, and that Congress has expressed concern in a number of contexts for the plight of the impecunious plaintiff in an increasingly expensive federal judicial system, such concerns do not warrant the complete and automatic exclusion of Title VII defendants from the expert witness costs discretion found in Rule 54(d). Unless otherwise specifically provided by statute, Champion submits that expert witness costs are taxable for and against all federal litigants.

If Congress had intended to except Title VII plaintiffs from all potential costs responsibilities it would have done so but, from the plain language of the statute, Congress clearly made no such effort. Furthermore, for at least two reasons, district court discretion under Rule 54(d) does not present any practical threat to the filing of Title VII suits by impecunious plaintiffs.

First, the standard for taxing expert witness costs presents a formidable threshold obstacle to an award for any party. No one advocates nonstatutory awards of expert witness fees in routine cases where the trial court's proper resolution of the case did not rest upon the expert's testimony. Trial courts are perhaps more cognizant than anyone of the fact that, although frequently interesting, expert testimony is not always an indispensable part of the case. *See, e.g., Smith v. American Service Co.*, 38 Fair Empl. Prac. Cas. 377, 381 (N.D. Ga. 1985) (denying expert witness costs to a prevailing employment discrimination plaintiff). There are no floodgates to be opened.

Second, all costs of litigation, including statutory costs which are presumptively taxable, *e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981), are subject to denial by the trial court for any number of compelling equitable reasons, including inability to pay. *E.g., Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983). The same considerations should apply with equal force to nonstatutory costs such as expert witness fees. Moreover, not all Title VII plaintiffs are impecunious plaintiffs. Large and powerful labor organizations such as the IWA possess substantial economic resources and the nation's most prolific Title VII plaintiff, the U.S. Equal Employment Oppor-

tunity Commission, hardly can be equated with an out-of-work individual.

This Court's decision in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), does not require a different result. In addition to the fact that attorneys' fees awards traditionally are evaluated under entirely different standards than Rule 54(d) costs, *e.g.*, *Baez v. Department of Justice*, 684 F.2d 999, 1003 (D.C. Cir. 1982) (en banc), the *Christiansburg* standard rests upon the specific congressional intent behind a particular statute, section 706(a) of Title VII, 42 U.S.C. § 2000e-5(k). As argued previously, if district courts have authority to award expert witness costs at all, that authority is derived from Rule 54(d)'s incorporation of the federal judiciary's inherent equitable powers. Unlike section 706(k), Rule 54(d) applies to all causes of action and, unless the goal is utter chaos, Rule 54(d) should be interpreted uniformly both between parties and among the various causes of action heard by federal courts.

CONCLUSION

Champion is entitled to present its arguments to the district court in favor of taxing the expert witness fees incurred in this case. Rule 54(d) clearly provides the necessary discretion for the district court to make such an award to Champion and to any other federal litigant. For these reasons, the judgment of the court of appeals must be reversed.

Respectfully submitted,

Champion International Corporation,
Petitioner

Miles Curtiss McKee*
Jeffrey A. Walker

Fuselier, Ott, McKee &
Walker, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226

Attorneys for Petitioner

*Counsel of Record

No. 86-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, CLC, AND ITS LOCAL 5-376,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS

JAMES E. YOUNGDAHL
YOUNGDAHL & YOUNGDAHL, P.A.
2101 Main Street
P.O. Box 6030
Little Rock, AR 72216
(501) 376-6355
Counsel for Respondents

February 17, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. In actions to which the Civil Rights Attorney's Fee Act of 1976 applies, may the expert witness fees and expenses of prevailing plaintiffs be assessed against the defendants?

2. In view of the unchallenged finding of the trial court that this action under Title VII of the Civil Rights Act of 1964 was brought in good faith and not frivolous, unreasonable, or without foundation, is there any basis for assessing expert witness fees and expenses of the prevailing defendant against the plaintiffs?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. Prevailing plaintiffs in civil rights cases are entitled to be reimbursed for expert witness expense under the same standards as those applicable to their attorney's fees	7
A. The direction of the court below has devastating consequences for private enforcement of civil rights laws in the Fifth Circuit	7
B. Congress intended that prevailing plaintiffs in civil rights cases be reimbursed for expert witness expense	11
C. The direction of the court below is inconsistent with what has become an established judicial pattern for the reimbursement of prevailing plaintiffs in civil rights cases	16
II. In view of the unchallenged finding of the district court that this action was brought in good faith and was not frivolous, unreasonable or unfounded, the expert witness expenses of Champion cannot be taxed against the IWA	19
CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 4, 6, 7, 15
Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982) 7
Boykin v. Georgia-Pacific Corp., 706 F.2d 1384 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) 8
Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 3, 5, 12, 19
City of Riverside v. Rivera, 106 S. St. 2686 (1986) 5, 10, 13, 18
Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986) 18
Dowdell v. City of Apopka, Florida, 698 F.2d 1181 (11th Cir. 1983) 6, 10, 11, 16
Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) 7, 16
Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) 10
Heiar v. Crawford County, Wisconsin, 746 F.2d 1190 (7th Cir. 1984) 17
Henkel v. Chicago, St. P., M. & O. Ry., 284 U.S. 444 (1932) 4
Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*
Hutto v. Finney, 437 U.S. 678 (1978) 12, 18
IBEW v. Foust, 442 U.S. 42 (1979) 9
International Bro. of Teamsters v. United States, 431 U.S. 324 (1977) 10
International Woodworkers of America v. Champion Intl. Corp., 30 EMPL. PRAC. DEC. (CCH) ¶ 33,287 (N.D. Miss. 1982), *aff'd.*, 732 F.2d 939 (5th Cir. 1984) 3, 9
International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981), *on remand*, 34 EMPL. PRAC. DEC. (CCH) ¶ 34,324 (D. Md. 1984) 8, 9
International Woodworkers of America v. Georgia-Pacific Corp., 568 F.2d 64 (8th Cir. 1977), *on remand, sub nom. Powell v. Georgia-Pacific Corp.*, 535 F.Supp. 713 (W.D. Ark. 1980, 1982) 8
Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), *cert. dismissed*, 453 U.S. 950 (1981) 7

TABLE OF AUTHORITIES—Continued

	Page
Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984)	10, 18
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	5, 9, 15
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	12, 13, 18
North Carolina Dept. Transp. v. Crest St. Comm. Coun., 107 S. Ct. 336 (1986)	18
Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983)	18
Vaca v. Sipes, 386 U.S. 171 (1967)	9
White v. New Hampshire Dept. Empl. Sec., 455 U.S. 445 (1982)	18
Statutes:	
Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988	*passim*
Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*	5
28 U.S.C. § 1821	1, 4
28 U.S.C. § 1920	2
42 U.S.C. § 1981	3, 12
42 U.S.C. § 2000e-(k)	*passim*
Other Material:	
AFL-CIO News, Jan. 31, 1987	9
Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986)	10
121 CONG. REC. S 14975 (daily ed. Aug. 1, 1975)	13
122 CONG. REC. H 12159-60 (daily ed. Oct. 1, 1976)	14
122 CONG. REC. H 12165 (daily ed. Oct. 1, 1976)	15
65 DAILY LABOR REPORT § D (Apr. 2, 1980)	8
GOULD, BLACK WORKERS IN WHITE UNIONS (1977)	8
Hammerman & Rogoff, *How to Live with Title VII: An Opportunity for Unions*, 2 EMPLOYEE REL. L. J. 13 (1976)	8

TABLE OF AUTHORITIES—Continued

	Page
H.R. REP. No. 94-1558, 94th Cong., 2d Sess.	14, 15
LABOR RELATIONS YEARBOOK—1980, at 318 (1981)	8
Note, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U.L. Q. 75 (1982)	20
Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fee Awards Act*, 80 COLUM. L. REV. 346 (1980)	11
Rule 54(d), FED. R. CIV. P.	2
SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983)	10
S. REP. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908	13, 14, 15
Youngdahl, *Equal Employment and Affirmative Action: the Union Role*, in PROCEEDINGS, N.Y.U., ANN. CONF. ON LABOR, at 163 (1974)	8
Youngdahl, *Union Standing in Prosecution of Employment Discrimination Litigation: Questions of Class*, 38 ARK. L. REV. 24 (1984)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-328

CHAMPION INTERNATIONAL CORPORATION,
Petitioner

v.

INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, CLC, AND ITS LOCAL 5-376,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS

STATUTES INVOLVED

28 U.S.C. § 1821(a)(1). Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.

28 U.S.C. § 1821(b). A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fees for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or any time during such attendance.

28 U.S.C. § 1920. A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

42 U.S.C. § 1988. In any action or proceeding to enforce [specified federal civil rights statutes including 42 U.S.C. § 1981] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-(k). In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Rule 54(d), FED. R. CIV. P. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . .

STATEMENT OF THE CASE

In December, 1974, respondents International Woodworkers of America, AFL-CIO, CLC, and its Local 5-376 ("IWA"), filed a charge with the Equal Employment Opportunity Commission alleging racially discriminatory employment practices by petitioner Champion International Corporation ("Champion") at its Oxford, Mississippi, particleboard plant. In February, 1978, the IWA filed suit in the United States District Court for the Northern District of Mississippi based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") and 42 U.S.C. § 1981. Three individuals intervened as plaintiffs and were certified as representatives of a class of black employees at the Champion plant.

After trial of the liability stage, on September 10, 1982, the court issued an opinion and judgment dismissing the complaint and assessing costs against the IWA. *International Woodworkers of America v. Champion Intl. Corp.*, 30 EMPL. PRAC. DEC. (CCH) ¶ 33,287 (N.D. Miss. 1982), *affd.*, 732 F.2d 939 (5th Cir. 1984).

Champion thereuopn filed applications for costs totalling $38,072.20 ($31,333.87 for "Expert Witness Fees & Expenses") plus attorney's fees. In an order finding that "the record demonstrates that the lawsuit was brought in good faith and was neither frivolous, unreasonable nor without foundation," the court denied the application for attorney's fees based on *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and referred other costs questions to a magistrate. Order of December 30, 1982, No. WC-78-33-WK-P (N.D. Miss.).

Among various other costs rulings, the magistrate awarded Champion expert witness fees in a reduced amount of $11,807.16. Petition for Writ of Certiorari ("Petition"), Appendix D. On appeal by the IWA, the district judge held that the expert witness charges were

governed by the same standards as attorney's fees under *Christianburg*: none should be assessed because of his finding that the lawsuit had been brought in good faith, etc. Petition, App. C.

Champion appealed on the expert witness costs issue to the Court of Appeals for the Fifth Circuit; a panel affirmed in light of the unchallenged district court finding under the *Christianburg* test. Petition, App. B.

On *en banc* rehearing, the Fifth Circuit again affirmed but with completely different reasoning by an 11-4 majority. Relying primarily on the combination of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *Henkel v. Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932), the court held that expert witness fees are not taxable costs *in any case* absent statutory authorization or application of one of the "three narrow equitable expectations recognized by *Alyeska*." Petition, App. A.

Civil rights cases are no exception, the court held, because the applicable attorney's fee-shifting statutes do not *expressly* mention expert witness costs. Petition, at A-11. Four concurring members disagreed with this aspect of the opinion, preferring the reasoning of the district court, the circuit panel, other circuits and the previous rule in the Fifth Circuit with respect to the expenses of civil rights plaintiffs. Petition, at A-14 to A-26.

SUMMARY OF ARGUMENT

Prevailing plaintffs in civil rights cases are entitled to be reimbursed for expert witness expense under the same standards as those applicable to their attorney's fees.

The decision of the court below includes a "direction" to the district courts within its jurisdiction to reject taxation of witness costs other than those specified by 28 U.S.C. § 1821. The direction clearly encompasses out-

of-pocket costs for prevailing plaintiffs in civil rights cases, heretofore recoverable as part of "attorney's fees" under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988.

Respondent IWA would prevail in this case as to the expert witness expense of petitioner Champion under the theories of either the majority or the minority of the 11-4 *en banc* opinions below. However, the IWA has maintained an active legal program to enforce Title VII for fifteen years. Without the ability to collect its out-of-pocket expenses when it prevails, continuation of that effort as a "private attorney general" is in jeopardy.

Expert witness fees and expenses are large and vital expenditures for the effective presentation of Title VII class action claims. As a practical matter, if they are not taxed against losing defendant employers they must be assumed by the plaintiff lawyers. Thus for victims of discrimination general access to the courts and reasonable fee recovery for their attorneys are threatened.

The court below erred in concluding that there is insufficient indication of congressional intention to allow the recovery of out-of-pocket expenses including expert witness fees for prevailing civil rights plaintiffs.

Although the language of 42 U.S.C. §§ 1988 and 2000e-(k) is simple, its interpretation by this Court has been expanded in light of its history and purpose. *E.g.*, *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). *See City of Riverside v. Rivera*, 106 S. Ct. 2686, 2695-97 (1986).

Senate and House reports included statements of intention that civil rights plaintiffs recover "what it costs them to vindicate these rights," that their attorneys be paid as is traditional for attorneys with fee-paying clients, that the concept of "private attorneys general" in the sense of *Newman v. Piggie Park Enterprises, Inc.*,

390 U.S. 400 (1968), was being adopted, and that fee diminution should not be permitted. The chief House sponsor stated on the floor that "the phrase 'attorney's fee' would include . . . all incidental and necessary expenses incurred in furnishing effective and competent representation."

The majority below relied primarily on *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), yet 42 U.S.C. § 1988 was enacted directly to counteract the effects of *Alyeska* on civil rights plaintiffs.

The understanding that Congress intended for the term "attorney's fee" in civil rights legislation to include out-of-pocket costs is held by every other circuit court of appeals. *E.g., Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1188-92 (11th Cir. 1983). Moreover, the injection of this new problem into fee computations could require reexamination of the system developed by this Court in a series of cases. *E.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In view of the unchallenged finding of the district court that this action was brought in good faith and was not frivolous, unreasonable or unfounded, the expert witness expenses of Champion cannot be taxed against the IWA.

The district court found that this action met the *Christianburg* standards under which there is no fee-shifting in favor of a prevailing civil right defendant, and that finding has been unchallenged on appeal. Since Congress intended that out-of-pocket costs be considered within the concept of "attorney's fees," the result below must stand.

ARGUMENT

I. Prevailing plaintiffs in civil rights cases are entitled to be reimbursed for expert witness expense under the same standards as those applicable to their attorney's fees.

A. *The direction of the court below has devastating consequences for private enforcement of civil rights laws in the Fifth Circuit.*

The court below held:

> that the fees of non-court-appointed expert witnesses are taxable by federal courts in non-diversity cases only in the amount specified by [28 U.S.C.] § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of the three narrow exceptions recognized by *Alyeska* [*Pipeline Service Co. v. Wilderness Society*] applies.

Petition, at A-12. Although the breadth of this rule was not necessary for disposition of the instant case, the announcement was more than dictum, as the court went on to say:

> We direct the district courts in the exercise of our supervisory power to apply the rule anounced today to all pending cases.

Ibid.

There can be no question that since June 2, 1986, prevailing plaintiffs in civil rights action in Fifth Circuit states have been unable to recover the expenses necessary for the prosecution of their cases which they would have been granted routinely under the previous circuit rule. *See Fairley v. Patterson*, 493 F.2d 598, 606, n. 11 (5th Cir. 1974); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981); *Berry v. McLemore*, 670 F.2d 30 (5th Cir.

1982). Application of the new general rule to civil rights cases was expressly confirmed by the majority, and was the subject of the concurrence. Petition, at A-11, A-13, A-14 and A-26.

Respondent IWA would not have to pay the $12,000 in issue under the view of any judge who passed on the case, from the district court through the appellate panel to both *en banc* opinions. But the IWA has an interest in this case which far overshadows its particular result. Primary concern must be focused on the new Fifth Circuit rule denying to *prevailing civil rights plaintiffs* the recovery of their out-of-pocket expenses. *See* Respondent's Brief in Opposition at 4-8.

The IWA has conducted a program for the enforcement of Title VII in the forest products industry for about fifteen years.[1] On the whole, it has been successful.[2] But without recovery of out-of-pocket expenses, the

---

[1] For a history of the program *see* Youngdahl, *Equal Employment and Affirmative Action: the Union Role*, in PROCEEDINGS, N.Y.U. 27TH ANN. CONF. ON LABOR, at 163 (1974); Youngdahl, *Union Standing in Prosecution of Employment Discrimination Litigation: Questions of Class*, 38 ARK. L. REV. 24, 32-38 (1984).

[2] *E.g., International Woodworkers of America v. Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977), *on remand, sub nom. Powell v. Georgia-Pacific Corp.*, 535 F.Supp. 713 (W.D. Ark. 1980, 1982); *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259 (4th Cir. 1981), *on remand*, 34 EMPL. PRAC. DEC. (CCH) ¶ 34,324 (D.Md. 1984); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). The EEOC issued its first statement on effects of union activity to enforce Title VII (LABOR RELATIONS YEARBOOK—1980, at 318 (BNA 1981)) based on an agency background paper which gave significant recognition to the IWA affirmative action program. 65 DAILY LABOR REPORT § D (Apr. 2, 1980). *See also* Hammerman & Rogoff, *How to Live with Title VII: An Opportunity for Unions*, 2 EMPLOYEE REL. L. J. 13 (1976); GOULD, BLACK WORKERS IN WHITE UNIONS 242 (1977).

financial stresses of the program would, at the very least, have seriously jeopardized its maintenance.[3]

In a sense the instant case illustrates the factual problem. The bill for the expert who testified for Champion exceeded $31,000. Comments of the district court indicate that the failure of the plaintiffs to hire an expert of their own[4] had a serious impact upon their chances of winning on the merits. *See International Woodworkers of America v. Champion Intl. Corp., supra*, 30 EMPL. PRAC. DEC. at 28,182 and 28,185 ("Plaintiffs offered no statistician to contradict [the Champion expert's] methodology or opinions. . . ."). The burden of carrying a $31,000 obligation for the thirteen years this case has lasted is serious enough. If, under the decision below, the plaintiffs could not recover such amounts in the situations where they finally prevail, it would be a clear impediment to continued service as a "private attorney general" in enforcing the laws against employment discrimination. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

The concurring opinion makes two practical points which are not, and cannot be, disputed. First, expert

---

[3] In *Chesapeake Bay, supra* note 2, for example, "expenses" were about fifteen percent of the total attorney recovery. 33 EMPL. PRAC. DEC. at 33,274. There is not an iota of record evidence that the IWA is a "large and powerful labor organization," as Champion asserts. Brief for Petitioner, at 11. In fact, the IWA is in the process of breaking up because, in large part, of its financial problems. *See* AFL-CIO News, Jan. 31, 1987, at 3, col. 2. Virtually by definition, unions have limited financial resources. *Compare IBEW v. Foust*, 442 U.S. 42, 50-51 (1979); *Vaca v. Sipes*, 386 U.S. 171, 197 (1967). The NAACP Legal Defense Fund, surely one of the largest litigators for civil rights plaintiffs, asserts that most "Title VII class actions require out-of-pocket expenditures of at least $100,000 in order to prepare and present them adequately." Brief of the NAACP Legal Defense and Education Fund, Inc., as *Amicus Curiae* in Support of the Grant of a Writ of Certiorari, at 10.

[4] The reason for the decision was primarily the high cost, even with the possibility of later recovery extant at the time.

witnesses are an "unavoidable necessity" in civil rights class actions in particular, and second, expert witness fees are a large part of the "staggering" costs of litigation. Petition, at A-34. For example:

> Statistics play a dominant role in virtually all adverse impact cases and disparate treatment class actions. Statistical proof is the very core of evidence in adverse impact cases because relevant assessments and comparisons must be expressed in numerical terms. In the disparate treatment class action case, statistics are generally utilized to establish the required pattern or practice of discrimination.

SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1331 (2d ed. 1983). *See International Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazlewood School Dist. v. United States*, 433 U.S. 299 (1977).

> The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys.

Dowdell v. City of Apopka, Florida, 698 F.2d 1181, 1190 (11th Cir. 1983).

Moreover, as a practical matter, the attorney for a class is responsible for the payment of an expert, and bears the risk of losing those costs in an unsuccessful action.[5] If that attorney is not allowed to collect the ex-

---

[5] Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 695, n.72 (1986). The costs referred to here do not include, of course, "routine office overhead normally absorbed by the practicing attorney" and subsumed within the hourly attorney's fee. Dowdell v. City of Apopka, Florida, *supra*, 698 F.2d 1192. The distinction usually involves a determination of what expenses "a privately retained lawyer would bill to his client." Petition, at A-16. *See* Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 30 (D.C. Cir. 1984). Fees for the hours spent by law clerks were included in a "reasonable attorney's fee" without special comment in City of Riverside v. Rivera, 106 S.Ct. 2686, 2690 (1986).

pert witness expenses in a successful civil rights action, it will have a substantial impact on the ability to present civil rights claims because of diminished legal fees that result. *See Dowdell v. City of Apopka, Florida, supra*, 698 F.2d at 1190.

> As Congress recognized, fee shifting can be an "important tool" for ensuring the enforcement of constitutional guarantees. However, the tool is only effective when the award granted by the court covers the expenses of litigation and returns to the attorney a profit equivalent to that which he would have earned in his normal practice. To the extent that the statutory fee returns a lesser amount, lawyers will be economically discouraged from taking these cases.

Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fee Awards Act*, 80 COLUM. L. REV. 346, 372 (1980).

In sum, the challenged "direction" of the court below has consequences which are devastating to private enforcement of civil rights laws in the Fifth Circuit. In general, the litigation costs for successful plaintiffs have been increased markedly. In particular, the opportunity for attorneys willing to undertake such litigation to earn a reasonable fee has been diminished substantially.

B. *Congress intended that prevailing plaintiffs in civil rights cases be reimbursed for expert witness expense.*

The majority below found no congressional intention to allow reimbursement of expert witness expense to prevailing civil rights plaintiffs, and overruled a Fifth Circuit decision to the contrary as having relied upon "only a single sentence from a Senate report. . . ." Petition, at A-11. This conclusion frames the critical issue in this case,[6] and was clear error.

---

[6] Concentration by respondent IWA on this issue illustrates its distinction from the issue in Crawford Fitting Co. v. J.T. Gibbons,

Demand by the court that intention to include expert witness fees be *express* in a congressional enactment is misplaced. *See* Petition, at A-9, A-13. With particular respect to civil rights attorney's fees statutes, this Court repeatedly has given broader and more complex meaning to simple words by drawing from the purpose and history of the legislation. *E.g., Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (standard for recovery of fees different for "prevailing party" plaintiffs and defendants); *Hutto v. Finney*, 437 U.S. 678, 697-702 (1978).

The legislative history of the 1964 Title VII attorney's fee provision, 42 U.S.C. § 2000e-(k), is "sparse." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). However, this Court repeatedly has looked to the history of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, "legislation similar in purpose and design to Title VII's fee provision," for indications of congressional intent. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71, n.9 (1980); *Hensley v. Eckerhart*, 461 U.S. 424, 434, n.7 (1983). Moreover, the instant complaint was also founded on 42 U.S.C. § 1981, and the challenged direction of the court below applies to all of the statutes within the ambit of the 1976 fee legislation.

Examination of the history of 42 U.S.C. § 1988 leaves no reasonable doubt that Congress intended the concept of "attorney's fees" to include expert witness costs and similar out-of-pocket expenditures.[7]

Inc., the consolidated case. IWA relies on particular statutory authorization for its positions, whereas respondent Gibbons argues that *in the absence of statutory authorization*, expert witness fees are not taxable.

[7] In a brief being filed simultaneously, *amicus curiae* NAACP Legal Defense and Education Fund, Inc., presents a meticulous examination of the legislative history of § 1988. Rather than repeating all of such material here, IWA adopts the *amicus* pre-

The manifest purpose of the 1976 enactment is most significant.

> Congress enacted § 1988 specifically because it found that that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See House Report, at 3. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market.

City of Riverside v. Rivera, 106 S.Ct. 2686, 2695 (1986).

> It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation *furthers this goal, while a contrary rule would force the complainant to bear the costs of* mandatory state and local proceedings *and thereby inhibit the enforcement of a meritorious discrimination claim.*

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) (Emphasis added.).

The Senate Report is difficult to misunderstand.

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover *what it costs them* to vindicate these rights in court.

S. REP. NO. 94-1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5910 (Emphasis added.). The "recover what it costs them" language was also used by Senator Tunney, an initial sponsor, on the Senate floor. 121 CONG. REC. S 14975 (daily ed. Aug. 1, 1975).

"In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compen-

---

sentation and will deal here only with its highlights and broader connotations.

sated by a fee-paying client. . . ." S. REP. No. 94-1101, *supra*, at 6. "If the cost of private eforcement becomes too great, there will be no private enforcement." *Ibid.*

House action was consistent.

> Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts.

H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 1.

> The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so.

Id. at 3. Representative Drinan, the author of this report and chief sponsor of the bill, explained authoritatively on the House floor:

> The language of [the bill] tracks the wording of attorneys fee provisions in other civil rights statutes such as section 706(k) of Title VII—employment—of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application. . . . These evolving standards should provide sufficient guidance to the courts in construing this bill which uses the same term. *I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation.*

122 CONG. REC. H 12159-60 (daily ed. Oct. 1, 1976) (Emphasis added.).

Again, in the words of "the original sponsor," Representative Seiberling:

> The meaning is very simple: when the cost of private enforcement actions becomes too great, there will be no private enforcement.

122 CONG. REC. H 12165 (daily ed., Oct. 1, 1976).

The "private attorney general" concept of *Newman v. Piggie Park Enterprises, Inc.*, *supra*, was central throughout. *E.g.*, S. REP. 94-1011, *supra*, at 3; H.R. REP. 94-1558, *supra*, at 6. Reports from both houses took pains to express the intention that the attorney's fees not be diminished by extraneous considerations. S. REP. 94-1011, *supra*, at 6; H.R. REP. 94-1558, *supra*, at 8-9.

Not only did the majority below ignore these compelling indications in the history of the 1976 legislation.[8] Its primary reliance was on *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), although enactment of 42 U.S.C. § 1988 was in *direct and immediate reaction to Alyeska* with respect to civil rights cases. *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983); S. REP. No. 94-1011, *supra*, at 1; H.R. REP. No. 94-1558, *supra*, at 2-3. It is illogical for the court to have considered expert witness fees to be enough like attorney's fees to be controlled by the *Alyeska* reasoning, but not enough like them to be controlled by the congressional cancellation of that reasoning.

A significant aspect of the legislative history is its demonstration of congressional intention to reinstate pre-*Alyeska* case law on attorney's fee issues in civil rights cases. *E.g.*, S. REP. No. 94-1011, *supra*, at 4-6; H.R. REP. No. 94-1558, *supra*, at 6-9. One of the cases expressly

---

[8] Prior to the issuance of the decision below, there was no indication that the court was taking up the question of expert witness fees for *prevailing* civil rights *plaintiffs*, unnecessary to resolution of the issues presented and decided up to then. Thus no opportunity to discuss the full legislative history was offered to the parties. *Amicus* NAACP Legal Defense Fund did submit an unsuccessful Motion for Reconsideration.

disapproved by *Alyseka* (421 U.S. at 272, n.46), but in effect reinstated by § 1988, was *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974), where one of the clearest early statements about out-of-pocket costs for prevailing civil rights plaintiffs appears:

> Court costs not subsumed under federal authority normally granting such costs against the adverse party, F.R.C.P. 54(d) . . . are to be included in the concept of attorney's fees.

493 F.2d at 608, n.11.

In sum, multiple indications of congressional intention, especially in the context of the history and larger purposes of the simple fee-shifting statement that constitutes the statute itself, compel reversal of the "direction" of the court below as to expert witness expense for prevailing civil rights plaintiffs.

C. *The direction of the court below is inconsistent with what has become an established judicial pattern for the reimbursement of prevailing plaintiffs in civil rights cases.*

As the concurring opinion demonstrates, prior to the decision below,

> no circuit has limited the award to litigation expenses incidental to attorney's fees under § 1988 to the costs enumerated in § 1920. None has found reason to treat expert witness fees as sui generis, and none has applied *Alyeska* in this context.

Petition, at A-23. Its all-circuit compendium, *id.*, at A-20 to A-23, requires little supplementation here.

The most thoughtful analysis appears in *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1188-92 (11th Cir. 1983).

> The issue of which expenses are properly chargeable to the defendants under section 1988 . . . is governed by the purposes of the governing statute and the

> nature and context of the specific litigation. The purpose of the Attorney's Fees Awards Act is to ensure the effective enforcement of the civil rights laws, by making it financially feasible to litigate civil rights violations. Because civil rights litigants are often poor, and judicial remedies are often non-monetary, the Act shifts the costs of litigation from civil rights victim to civil rights violator.

698 F.2d at 1189 (Citations omitted). The two justifications for this "cost-shifting" apparent from the legislative history are access to the courts for the victims and incentive for "private attorneys general." "Because the Act is designed to translate policy into fact, the standard of reasonableness is governed by the economic realities of civil rights litigation." *Ibid.*

> Reasonable attorneys' fees under the Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. . . . If [all] these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly.

698 F.2d at 1190.

The Seventh Circuit has been clear:

> [E]xpenses of litigation that are distinct from either statutory costs or the costs of the lawyer's time reflected in his hourly billing rates—expenses for such things as postage, long-distance calls, xeroxing, travel, paralegals and expert witnesses—are part of the reasonable attorney's fee allowed by the Civil Rights Attorney's Fees Awards Act.

Heiar v. Crawford County, Wisconsin, 746 F.2d 1190, 1203 (7th Cir. 1984).

The analysis has not always been precisely the same, but the conclusions have been consistent.

> Even if a firm advances [the fees and costs of expert witnesses] in a contingent fee case, reimbursement from the client's recovery in addition to the attorney's contingent fee is usually expected. Therefore, if the district court concludes that expert testimony was reasonably necessary, it may reimburse reasonable expert witness fees under § 1988.

Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983). *See also Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 30 (D.C. Cir. 1984) (quoted in Petition at A-22 to A-23); *Daly v. Hill*, 790 F.2d 1071, 1082-84 (4th Cir. 1986) (reported after the circuit-by-circuit review included in the concurring opinion below).

But it is not just the unbroken line of courts of appeals' decisions with which the new Fifth Circuit majority clashes. This Court has developed an extensive body of law on the computation of fees under 42 U.S.C. §§ 1988 and 2000e-(k). *E.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *White v. New Hampshire Dept. Empl. Sec.*, 455 U.S. 445 (1982); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986); *North Carolina Dept. Transp. v. Crest St. Comm. Coun.*, 107 S. Ct. 336 (1986). *Hensley* and *City of Riverside*, in particular, dealt with the mechanics of fee determination.

The Fifth Circuit injects a brand new factor into these calculations. Should the "lodestar" rate be increased because the attorney had to pay for the expert witness fees for an impecunious client? Is enhancement to be more favored because of the increased contingency hazard in such circumstances? Questions of this kind can be answered, of course, but they increase the threat of "a second major litigation" which *Hensley* eschewed. 461 U.S. at 438.

Since June 2, 1986, there has been a large volume of civil rights cases pending in Fifth Circuit states, in all stages. In many of them, "private attorneys general," relying on the previous nationwide rule, had employed experts to perform vital services for their clients and the classes they represent. To tell such attorneys now that they, not the violators of law, are responsible for such previously incurred costs is, at least, shocking. That is what the decision below does; that is *not* what Congress intended.

II. In view of the unchallenged finding of the district court that this action was brought in good faith and was not frivolous, unreasonable or unfounded, the expert witness expenses of Champion cannot be taxed against the IWA.

There remains the particular question raised by petitioner Champion.[9] As a prevailing *defendant* in a civil rights action, is it entitled to reimbursement for its expert witness expense?

Every judge to pass on this question below answered in the negative. The district court, the circuit panel and the concurring *en banc* minority reasoned that since expert witness fees were included in the concept of attorney's fees under the civil rights fee-shifting statutes, they were controlled by the analysis of this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

---

[9] Respondent IWA agrees with consolidated case respondent J.T. Gibbons, Inc., and the majority opinion below, that *absent independent statutory authority* federal district courts do not have the general power to award expert witness fees as part of the "costs." IWA makes no effort to address this broad point, however, because of its view that Congress *has* granted such authority in civil rights cases, and because it is being presented by Gibbons and affirmance of the particular result below would flow from either contention.

Under the continuing *Christianburg* standard, a defendant is entitled to fees as a "prevailing party" only if the action had been brought in bad faith, or if the claim was "frivolous, unreasonable, or groundless." 434 U.S. at 423. *See Hensley v. Eckerhart, supra,* 461 U.S. at 430, n.2.[10]

The district court dealt directly with the various prongs of this test in response to a Champion motion for an award of attorney's fees by "an express finding that the lawsuit was not brought in bad faith nor was it frivolous, unreasonable, or without foundation." Petition, at C-2. On subsequent consideration of the application for expert witness fees, the court applied the same test in reliance on prior consistent Fifth Circuit authority. *Id.*, at C-5 to C-7. Noting that the trial court finding was "unchallenged on appeal by Champion," the panel affirmed. *Id.*, at B-5.

Because of the same reasoning discussed in the first argument point, *supra,* IWA seeks affirmance of the *result* below. *See id.*, at A-26. Since Congress intended "attorney's fees" to include out-of-pocket costs in civil rights litigation, taxation of costs beyond those enumerated in 28 U.S.C. § 1920 must be controlled by the distinction between prevailing plaintiffs and prevailing defendants developed for awards of the basic attorney's fees themselves.

---

[10] *See also* Note, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement,* 60 WASH. U.L. Q. 75 (1982).

CONCLUSION

The respondents ask that the court below be reversed as to its direction that prevailing plaintiffs in civil rights actions may not recover from the defendants their expert witness fees and expenses.

As to the result below, however, the respondents ask that the judgment of the court be affirmed.

Respectfully submitted,

JAMES E. YOUNGDAHL
YOUNGDAHL & YOUNGDAHL, P.A.
2101 Main Street
P.O. Box 6030
Little Rock, AR 72216
(501) 376-6355
Counsel for Respondents

February 17, 1987

No. 86-328

In The
Supreme Court of the United States
October Term, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 5-376,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Miles Curtiss McKee*
Jeffrey A. Walker

Fuselier, Ott, McKee
& Walker, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF AUTHORITIES

	Page(s)
Bennett v. Department of Navy, 699 F.2d 1140 (Fed. Cir. 1983)	3
Blum v. Stenson, 465 U.S. 886 (1984)	3
Chicago College of Osteopathic Medicine v. George A. Fuller Co., 801 F.2d 908 (7th Cir. 1986)	1
City of Riverside v. Rivera, 106 S.Ct. 2686 (1986)	3
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946)	2
Hensley v. Eckerhart, 461 U.S. 424 (1983)	3
Marek v. Chesney, 105 S.Ct. 3012 (1985)	2
Northcross v. Memphis City Schools, 611 F.2d 624 (6th Cir. 1979)	3
Pennsylvania v. Delaware Valley Citizens' Council, 106 S.Ct. 3088 (1986)	3
Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240 (9th Cir. 1982)	3
United States v. City of Twin Falls, 806 F.2d 862 (9th Cir. 1986)	1
United States v. Oregon, 366 U.S. 643 (1961)	3
Wheeler v. Durham City Board of Education, 585 F.2d 618 (4th Cir. 1978)	3

No. 86-328

In The
Supreme Court of the United States
October Term, 1986

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 5-376,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Most of the parties' exchanges of arguments and authorities to this stage of the case mirror the various conflicting positions adopted by the courts of appeals. *Compare United States v. City of Twin Falls,* 806 F.2d 862, 876-78 (9th Cir. 1986) (clarifying the circuit's position favoring discretion to tax expert witness fees) *with Chicago College of Osteopathic Medicine v. George A. Fuller*

Co., 801 F.2d 908, 909-12 (7th Cir. 1986) (clarifying the circuit's position against discretion to tax expert witness fees). In reply, Champion offers three points for the Court's particular consideration.

First, in various ways and at various points in their responses, the Respondents and their supporters have contended that Rule 54(d)'s proviso somehow affects whether a particular litigation expense may be taxed as part of the prevailing party's costs. *E.g., Brief for Amici Curiae NAACP* at 11-12. This position flies in the face of a common sense reading of Rule 54(d) as well as the Court's application of the proviso in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275-284 (1946), and similar statements more recently in *Marek v. Chesny*, 105 S.Ct. 3012, 3017 (1985). Rule 54(d) establishes only that costs may not be taxed where Congress has expressly forbidden taxation; nowhere does Rule 54(d) define what is and what is not a potentially taxable litigation expense.

Second, the positions urged by Respondent IWA and the amici curiae, at least to a point, are not necessarily inconsistent with Champion's positions. That is, there is little doubt that expert witnesses are frequently of critical importance in Title VII and related civil actions. Champion therefore agrees that it is entirely consistent with the congressional policies underlying Title VII that such expenses, where necessary and appropriate, be taxed for whichever party prevails. Indeed, Champion further submits that it would be impossible to find a contrary congressional intent for most federal causes of action since Congress likely would approve of such recoveries for any party who had been able to advance or defend a federal right in large part because of expert witness assistance.

Third, Champion submits that Representative Drinan's single comment provides insufficient grounds for imputing to Congress, as the IWA insists, an intent to equate expert witness costs with attorneys' fees. *See also United States v. Oregon*, 366 U.S. 643, 648 (1961) (resort to legislative history is unnecessary when statute is clear and unequivocal on its face). Although the Court has addressed a number of statutory attorneys' fees issues, particularly recently,[1] not a single case has even intimated that attorneys' fees encompass anything significantly beyond an hourly rate. Moreover, the courts of appeals have overwhelmingly rejected arguments that litigation expenses such as expert witness fees are to be taxed as attorneys' fees. *E.g., Bennett v. Department of Navy*, 699 F.2d 1140, 1143-44 (Fed. Cir. 1983); *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983); *Northcross v. Memphis City Schools*, 611 F.2d 624, 639-40 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 623-24 (4th Cir. 1978).

The key to this case always has been and continues to be whether Rule 54(d) has entrusted to the federal trial courts sufficient discretion to tax as a part of the costs, in exceptional cases, the expert witness fees of the prevailing party where the trial judge finds that such testimony was necessary to the finder of fact's proper determination of the case. It has never been suggested, nor

---

[1] Pennsylvania v. Delaware Valley Citizens' Council, 106 S.Ct. 3088 (1986); City of Riverside v. Rivera, 106 S.Ct. 2686 (1986); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

reasonably could such arguments be made, that federal trial judges are incapable of such decisions.

Respectfully submitted,

Champion International Corporation,
Petitioner

Miles Curtiss McKee*
Jeffrey A. Walker

Fuselier, Ott, McKee
& Walker, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226

Attorneys for Petitioner

*Counsel of Record

No. 86-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 5-376,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STEVEN L. WINTER
University of Miami
School of Law
P.O. Box 248087
Coral Gables, Fla. 33124

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, New York 10013

JOHN A. POWELL
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036

JAMES ROBERTSON
HAROLD R. TYLER, JR.
Co-Chairmen
NORMAN REDLICH, Trustee
WILLIAM L. ROBINSON
RICHARD T. SEYMOUR
Lawyers' Committee for Civil
Rights Under Law
1400 'Eye' Street, N.W.
Washington, D.C. 20005

ANTONIA HERNANDEZ
E. RICHARD LARSON
Mexican American Legal Defense
and Educational Fund
634 South Spring Street
Los Angeles, CA 90014

Attorneys for Amici Curiae

*Counsel of Record

QUESTION PRESENTED

Can a prevailing civil rights defendant recover expert witness fees as part of costs absent adherence to the standards of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), when Congress deliberately incorporated such expenses in the fee shifting scheme of the civil rights acts?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of Amici 1

Summary of Argument 5

ARGUMENT

I. CONGRESS INCLUDED EXPERT WITNESS FEES AS PART OF ATTORNEYS' FEES UNDER THE CIVIL RIGHTS STATUTES AND, THEREFORE, THE SPECIFIC STANDARDS GOVERNING FEE SHIFTING UNDER THOSE STATUTES MUST CONTROL 11

II. CONGRESS WAS SPECIFICALLY AWARE OF AND LEGISLATED TO ALLEVIATE THE SIGNIFICANT PROBLEM OF EXPERT WITNESS FEES IN ENACTING THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 . . . 15

III. CONGRESS SPECIFICALLY INCORPORATED THE PREEXISTING CASE LAW THAT INCLUDED EXPERT WITNESS FEES AS PART OF ATTORNEYS' FEES AND COSTS IN ENACTING SECTION 1988 34

IV. TO EXCLUDE EXPERT WITNESS FEES FROM THE PURVIEW OF SECTION 1988 WOULD SUBVERT THE VERY PURPOSE OF THE ACT BY MAKING IT EFFECTIVELY IMPOSSIBLE FOR CIVIL RIGHTS PLAINTIFFS TO BRING MERITORIOUS CLAIMS THAT INVOLVED COMPLEX OR TECHNICAL MATTERS, CONTRARY TO CONGRESSIONAL INTENT . . . 49

CONCLUSION 62

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 444 U.S. 405 (1975) 44,60

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) . . . . . .passim

Bachman v. Pertschuk, 19 E.P.D. ¶9044 at 6508 (D.D.C. 1979) 62

Baker v. City of Detroit, 483 F. Supp. 919 (E.D. Mich. 1979) 61

Bazemore v. Friday, 478 U.S. ___, 92 L. Ed.2d 315 (1986) 61

Blum v. Stenson, 465 U.S. 886 (1984) 4,46,56

Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) . . . 4

Bradley v. School Bd. of City of Richmond, 53 F.R.D. 28 (E.D. Va. 1971) 32,59

Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980) 59

Cannon v. University of Chicago, 441 U.S. 677 (1979) 36,37,48

Castaneda v. Partida, 430 U.S. 482 (1977) 58

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) . . 4,7,9,12,13,31,51

City of Riverside v. Rivera, 477 U.S.___, 91 L.Ed.2d 466 (1986) 4,46,56

Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. (1982) 49

Crawford Fitting Company v. J. T. Gibbons, Inc., No. 86-322 11

Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974) . . . 44,45,46

EEOC v. Datapoint, 412 F. Supp. 406 (W.D. Tex. 1976) 44

Estelle v. Gamble, 429 U.S. 97 (1976) 60

Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) 32,42

Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963) . . . 40

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 45

Hanrahan v. Hampton, 446 U.S. 754 4 (1980) 48

Henkee v. Chicago, St. Paul, M & O Ry. Co., 284 U.S. 444 (1932) . . 11

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4,46

Holy Trinity Church v. United States, 143 U.S. 457 (1892) 33,34

Hughes v. Rowe, 449 U.S. 5 (1980) . .12,37

Hutto v. Finney, 437 U.S. 678 (1978) . 4

Jackson v. School Bd. of City of Lynchburg, Civ. Act. No. 534 (W.D. Va. April 28, 1970) 33

Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974) 4

Jones v. Diamond, 636 F.2d 1364 (5th Cir. (en banc), cert. granted sub nom. Ledbetter v. Jones, 452 U.S. 959, amended, 453 U.S. 911, cert. dismissed, 453 U.S. 950 (1981) 43

Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971) 33

Keyes v. School District No. 1, Denver Colo., 439 F. Supp. 393 (D. Colo. 1977) 43,47

Lane v. Walker, 307 U.S. 268 (1969) . . 58

La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) 21,32,33

Loewen v. Turnipseed, 505 F. Supp. 512 (N.D. Miss. 1981) 43

Maine v. Thiboutot, 448 U.S. 1 (1980). 33

McPherson v. School District #186, 465 F. Supp. 749 (S.D. Ill. 1978) 43

NAACP v. Button, 371 U.S.415 (1963) . 55

Neeley v. General Electric,90 F.R.D. 627 (N.D. Ga. 1981) 43

Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974) 60

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 4

Northcross v. Board of Ed., 611 F.2d 624 (6th Cir. 1979) 43,45,47

O'Bryan v. Saginaw County, Mich., No. 79-1297 (6th Cir. Jan. 6, 1981) 43

In re Primus, 436 U.S. 412 (1978) . . 55

Pyramid Lake Pauite Tribe v. Morton, 360 F. Supp. 669 (D.D.C. 1973). 21

Rios v. Enterprise Ass'n Steamfitters Local, 400 F. Supp. 993 (S.D.N.Y. 1975), aff'd, 542 F.2d 579 (2d Cir. 1976) 44

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) 45

Sabala v. Western Gillette, Inc., 371 F. Supp. 385 (S.D. Tex. 1974), aff'd in part, rev'd in part on other grounds, 516 F.2d 1251 (5th Cir. 1975), rev'd on other grounds, 431 U.S. 951 (1977) 32,44

Ste. Marie v. Eastern Railroad Association, 497 F. Supp. 800 (S.D.N.Y. 1980) 47,61

Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) . . . 39

Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972) 33

Sledge v. J.P. Stevens, 12 E.P.D. ¶11,047 (E.D.N.C. 1976) 44

Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974) 46

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) . 59

Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975) 46

Tennessee v. Garner, 471 U.S. ___, 85 L.Ed.2d 1 (1985) 60

Thornberry v. Delta Air Lines, 25 E.P.D. ¶31,496 (N.D. Cal. 1980) 61

Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25 (1986) 39,58

United States v. Bd. of School Comm'rs, 573 F.2d 400 (7th Cir.), cert. denied, 439 U.S. 824 (1978) 58

Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598 (1986) 58

Welsch v. Likins, 68 F.R.D. 589 (D. Minn.) aff'd, 525 F.2d 987 (8th Cir. 1975) 32

Wheeler v. Durham City Board of Education, 585 F.2d 618 (4th Cir. 1978) 45

Wright v. McMann, 321 Supp. 127 (N.D.N.Y. 1970) 33,45

Zuber v. Allen, 396 U.S. 168 (1969). 39

Statutes:

Civil Rights Attorney's Fees Award Act of 1976 . . . . . passim

42 U.S.C. §1988 . . . . . .passim

Pub. L. No. 94-73 §402 17

Pub. L. No. 96-481 §204a, 94 Stat. 2327 (Oct. 21, 1980) 24,37

42 U.S.C. §2000e-5(k) 5,14

42 U.S.C. §2412 11

Rule 54, F.R. Civ. Proc. 43

28 U.S.C. 1821 43

28 U.S.C. 1920 43

Other Authorities:

Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 94th Cong., 1st Sess. (1975) 21,22,23,24,25,27,28 29,30,35,52

Civil Rights Attorney's Fees Awards Act of 1976. Source Book: Legislative History, Committee Print Prepared By the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate (1976) . . 17,18,31,32,38, 39,40,41,42,51,52

The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93 Cong., 1st Sess. (1973) 16,20,21,26,30

H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) . . 18,31,32,40,50

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) . . 31,38,45,50,51,57

1975 U.S Code Cong. & Ad News 774 17

1980 U.S. Code Cong. & Ad News 4997 . 37

No. 86-328

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 5-376

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the The Fifth Circuit

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AND THE MEXICAN AMERICAN LEGAL AND EDUCATIONAL FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Interest of Amici*

* Letters of consent to the filing of this brief from counsel for the petitioner and the respondents have been filed with the Clerk of the Court.

The NAACP Legal Defense and Educational Fund, Inc., [LDF] is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee has, over the past twenty-four years, enlisted the services of well over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The American Civil Liberties Union is a non-partisan organization of over 250,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights. Toward that end the ACLU has acively represented aggrieved plaintiffs before this Court and in the lower federal courts. The continuing availability of attorneys fees and the related costs of complex and important constitutional litigation is of crucial concern to the ACLU and its continued defense of civil liberties.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization founded in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics in the United States.

Attorneys for amici have handled

cases involving the broad range of civil rights litigation. Amici have also participated in many of the leading cases involving attorneys' fees questions, both as counsel and as amici curiae,[1] and have provided testimony before Congress on the need to award fees and costs in civil rights cases and on the standards that should govern awards.

The issue raised on this appeal concerns the standards to be applied in awarding costs to successful civil rights litigants and will affect the entire

---

[1] E.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S. 678 (1978); Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974); Christiansburg Garment Co. v. Equal Employment Opportunity Comm., 434 U.S. 412 (1978); Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886 (1984); City of Riverside v. Rivera, 477 U.S. ___, 91 L.Ed.2d 466 (1986)

spectrum of civil rights litigation.

SUMMARY OF ARGUMENT

The district court and the panel of the Fifth Circuit correctly ruled that petitioner could not recover expert witness fees as part of its costs. The en banc Court reached the same result, but for manifestly the wrong reason. The basis of its decision would not only cripple the private enforcement of the civil rights laws but is also contrary to the clear intent of Congress.

This case turns on the application of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 [the Act] and the parallel provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k): Whether Congress included expert witness fees as part of "attorneys' fees and costs" in the fee shifting scheme of those Acts. The

decision in this case will materially affect the ability of private litigants to vindicate the rights secured by the broad range of civil rights legislation. If plaintiffs in civil rights cases cannot recoup the substantial expenses incurred in retaining necessary expert witnesses, they will be economically barred from effectively pursuing their statutory and constitutional rights. Conversely, if unsuccessful civil rights plaintiffs can be saddled with their opponents' often substantial expert witness fees, then good faith litigation will be deterred rather than encouraged as Congress intended.

A careful analysis of the legislative history of the Act reveals that Congress was aware that the economic barriers to private enforcement of these rights included not just the inability of

litigants to pay attorneys' fees, but also the other costs of efficacious litigation, including the significant and sometimes prohibitive expense of expert testimony. Congress was concerned about the disparity in litigating strength between civil rights plaintiffs and their typically more wealthy opponents, such as public corporations and local governments.

In legislating, Congress carefully crafted a statute that included expert witness fees as part of attorneys' fees when plaintiffs won and -- by adopting the Christiansburg standard -- shielded good faith but unsuccessful plaintiffs from bearing such large fee. It did this by incorporating and endorsing the prior case law that had included expert witness fees as part of "attorneys' fees" to be covered in the fee shifting provisions of

the Act. It made this clear by tracking of the language of prior attorneys' fees statutes and explicitly incorporating of the case law under those statutes; by explicitly adopting to the "private attorney general" line of cases; and by citing as illustrative cases that had awarded expert witness fees.

Moreover, the legislative debates make clear that proponents and opponents of the bill alike understood that the "attorneys' fees" covered by the Act's fee shifting scheme included a broad range of recoverable out-of-pocket expenses, such as expert witness fees, not traditionally recoverable as "costs" under the American Rule.

This Court should affirm the manifested intent of Congress. A contrary ruling would subvert the underlying purpose of the Act. Congress passed the

Act to encourage citizens to vindicate their rights in the courts, and to enable them to do so effectively. If expert witness fees could be imposed on losing civil rights plaintiffs absent the protection of the Christiansburg standard, these plaintiffs will simply be forced out of the courts. More importantly, if the en banc court's reasoning is left intact and expert witness fees were not recoverable, they could not be borne by the often indigent plaintiffs.

Nor could the cost of experts be met from the attorneys' fees. These fees are based only on reasonable hourly charges calculated to parallel market rates. If these fees were diminished by the expense of employing experts, they would not be adequate to attract competent counsel as Congress intended. The result of not

recognizing that expert fees were included in fee-shifting will be: that cases will not be presented effectively; that attorneys will not be willing to undertake representation; or that plaintiffs will be deterred from suing in the first place. Any of these would defeat the very purpose of the Act.

ARGUMENT

I. CONGRESS INCLUDED EXPERT WITNESS FEES AS PART OF ATTORNEYS' FEES UNDER THE CIVIL RIGHTS STATUTES AND, THEREFORE, THE SPECIFIC STANDARDS GOVERNING FEE SHIFTING UNDER THOSE STATUTES MUST CONTROL

Champion rests its entire argument on the equitable discretion said to be conferred on the district courts by F.R.C.P. 54(d). Putting aside the question whether Rule 54(d) was in fact intended by its drafters to confer such discretion,[2] it cannot possibly support Champion's position in this case. For Rule 54(d) contains a very explicit disclaimer. Its authorization of the

---

[2]It is the position of amici that Rule 54 was not so intended. Henkel v. Chicago, St. Paul, M. & O. Ry. Co., 284 U.S. 444 (1932). Thus we agree with the arguments made by respondents in the companion case of Crawford Fitting Company v. J.T. Gibbons, Inc., No. 86-322. As detailed in the text, however, the specificity of the civil rights fee shifting scheme makes the question irrelevant to decision in this case.

district courts to act with respect to costs was never intended to supplant specific congressional schemes with respect to fees and costs; the rule applies to all situations "[e]xcept when express provision is made . . . in a statute of the United States . . . ." Id.

It is our contention, which we document below, that §1988 is just such an explicit statutory scheme. Congress deliberately included expert witness fees in the fee shifting scheme of the civil rights statutes so that successful plaintiffs would be able to recover these otherwise onerous litigation expenses and so that unsuccessful, good faith, civil rights plaintiffs would be shielded under the standards of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (Title VII), and Hughes v. Rowe, 449 U.S. 5

(1980) (§1988), from bearing their opponents' expert expenses.

Amici, therefore, support the result reached by the court below: the prevailing defendant in this civil rights action may not receive expert witness fees and other expenses as part of an award of costs because the district court specifically held that plaintiffs acted in good faith and that the defendants had not met the Christiansburg standard. But we urge that the basis for the en banc court's decision is manifestly incorrect and that this Court should explicitly affirm the judgment denying costs on the basis of the district court and the Fifth Circuit panel's decisions: that the district court was correct when it held that Christiansburg was not satisfied because this action was not frivolous, unreasonable, or without foundation, nor

was it brought in bad faith.

In the remainder of this brief, amici address solely the issue of the inclusion in attorneys' fees of expert witness and other litigation costs and show that the court of appeals erred in concluding that expert witness fees are not recoverable as part of "attorneys' fees and costs" under 42 U.S.C. §§ 1988 and 2000e-5(d). We first show that Congress specifically considered this question when it deliberated and formulated the fees Act in 1976. We then show how Congress specifically acted to include expert witness fees in the Act's coverage. Finally, we demonstrate that any contrary conclusion would not only run afoul of Congress's clearly manifested intent, but also would undermine the basic purposes of the Act.

II. CONGRESS WAS SPECIFICALLY AWARE OF AND LEGISLATED TO ALLEVIATE THE SIGNIFICANT PROBLEM OF EXPERT WITNESS FEE EXPENSES IN ENACTING THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

In order better to understand the scope of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 [the Act], it is necessary to review the history of that legislation, including the hearings and events that led to its passage. As early as 1973, the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary held six days of hearings on the problems of economic barriers to citizen access to lawyers and the courts. Of these, two days were spent on the question of modifying the American Rule[3]

---

[3] As explicated by this Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975):

> At common law, costs were not allowed; but for centuries in

to allow for the recovery of costs, including attorneys' fees, by the prevailing party in litigation. Great attention was paid to the then mounting case law shifting fees in civil rights and other public interest litigation under the "private attorney general" theory. See The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93 Cong., 1st Sess. 787-88 (1973) (Statement

---

> England there has been statutory authority to award costs, including attorneys' fees. . . . "[T]he general practice of the United States is in oposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." This Court has consistently adhered to that early holding.

Id. at 247, 249.

of Senator Tunney).

This Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), gave impetus to Congress to fashion a statute that would shift fees in some cases. The Senate Judiciary Committee reported out two identical bills that provided for the shifting of fees in civil rights litigation, the first as part of the renewal of the Voting Rights Act in 1975, See Pub. L. No. 94-73 §402, 42 U.S.C. §1973; [1975] U.S. Code Cong. & Ad. News 774, and the second, S.2278, which eventually passed as §1988.[4] On the

---

[4]Civil Rights Attorney's Fees Awards Act of 1976, Source Book: Legislative History, Texts, and Other Documents. Committee Print Prepared By The Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate (1976), p. 5. This Committee Print collects the Senate and House reports and the proceedings and debates in both Houses. It will be cited throughout as "Legis. History ____."

House side, the Subcommitee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary held three days of hearings on various attorneys' fees statutes which resulted in the reporting out of a bill, H.R. 15460, which later passed as §1988. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 3-4 (1976). Legis. History 211-212.

The record before Congress in these hearings established that the economic deterrents to civil rights enforcement, and public interest litigation generally, included both the problems of attorneys' fees and the great expense of expert testimony. Each of the first three witnesses in the 1973 Senate hearings raised this problem. One of these was Dennis Flannery, one of plaintiffs' counsel in Alyeska. He testified

regarding the unique effects of economics on the public interest lawyer:

> When a big case such as this comes into a private law firm, ... expert witnesses are contacted, fee arrangements are made so that the expert witness can give his full attention to the case during the time he is needed, research is undertaken in a variety of areas (even areas that are tangential to the lawsuit, just to make sure you have covered every aspect). . . .
>
> Now, when a public interest firm is involved, or when a group of citizens or even an individual citizen decides to take on a big case and to present the views of the other side in a big case . . . . there is simply no money up front. . . . .[T]here is very little money for such essential things as, for example, expert witnesses. And so what I found . . . was that I did not have any money at all to pay any expert anything. And so basically what we had to do was to write or telephone around the country with our hat in our hands asking university people to give us assistance and to take some time off from their heavy class workload and give us whatever assistance they could. But at no time could we actually say to an expert, for example, give us three weeks, we want you down here in Washington, we want to go over this technical material with you, we want you to be

> prepared to be a witness at trial, if we go to trial, and we realize this takes a lot of time and we will pay you a fee. This is precisely what the other side was doing. But, we could not do that . . . .
>
> As a result, the public interest lawyer must pare off very important issues -- that might even be winning issues -- simply because they are either too technical or too big, or require too much expenditure of money.

Senate Hearings, supra, at 832-34 (Statement of Dennis Flannery). Senator Tunney, the chairman of the subcommittee and later the sponsor of S.2278, was clearly impressed by the scope of this problem, referring to it several times in the course of the hearings. See id. at 1108, 1127, 1128.[5]

---

[5] At one point, Senator Tunney referred to Flannery's testimony

> that in a difficult case it cost tens of thousands of dollars to be able to conduct the case including being able to get expert witnesses. . . . .

Senate Hearings, supra, at 1108.

This record was repeated in the House. One witness testified about a party having "to confine its activities to cross-examination of industry witnesses because it could not possibly afford to put on expert witnesses of its own. . . ." Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the Comm. on the Judiciary, House of Representative, 94th Cong., 1st

---

As indicated in the text, other witnesses before the subcommittee raised the problem of expert witness fees. J. Anthony Kline, the lawyer in La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D.Cal. 1971), one of the earliest "private attorney general" cases, described this imbalance in similar terms. Senate Hearings, supra, at 799. Another witness described the expenditure of $20,000 in expert witness fees which was recouped under the "private attorney general" theory as part of fees and costs in Pyramid Lake Pauite Tribe v. Morton, 360 F. Supp. 669 (D.D.C. 1973). Senate Hearings, supra, at 812, 816.

Sess. 159 (1975). (Statement of Peter H. Schuck, Consumers Union Inc.). Others, representing the Lawyers' Committee for Civil Rights Under Law, told of

> countless other cases that really ought to be brought because they represent a situation in which a statute is not being enforced, but in which they cannot be brought because there is no lawyer for them or because a lawyer might be willing to take the case, but cannot afford even the out-of-pocket expenses.

Id. at 100 (Testimony of Armand Derfner and Mary Frances Derfner, Lawyers' Comm. for Civil Rights). This testimony highlighted the importance of expert witness fees:

> These . . . attorneys -- private practitioners . . . -- face an additional problem: because of the limited resources available to them in public interest cases, they are rarely able to afford the technical assistance of expert witnesses. . . .

Id. at 89.[6] One witness went so far as to state that if expert witness fees were not included, "the very point of the bills may be defeated." Id. at 136 (Statement of John M. Ferren).

In the hearings that led to the enactment of §1988, Congress was consistently asked to respond to this Court's ruling in Alyeska invalidating the "private attorney general" line of cases.[7] Several witnesses referred to the

---

[6]They added:

> When Congress calls upon citizens ... to go to court to vindicate its policies and benefit the entire nation, Congress must also ensure that they have means to go to court and to be effective once they get there.

Id. at 90.

[7] Mr. Derfner testified on behalf of the Lawyers' Committee that:

> In that light, I would like to speak just for a second about one specific bill before this committee

Final Report of the American Assembly on Law in a Changing Society which was convened by the American Bar Association.

> which I think does deserve a great deal of attention, and which ought to be given priority consideration: H.R. 9552, introduced by Congressman Drinan. This is a civil rights provision. It deals with specific statutes that would be covered in specific types of cases. It takes up the area that was most damaged by the Alyeska decision because it is in the civil rights area that the Alyeska decision had its most damaging effect.

House Hearings, supra, at 95-96. Congressman Danielson noted the piecemeal nature of the process:

> I have a feeling we are commencing on what is going to be a . . . quite a bit of legislation before it is done, and that may take about 10 years. We will probably have to do as Mr. Crane suggested and take care of the more immediate needs to start with.

Id. at 78. Mr. Derfner later acknowledged the importance of modifying 28 U.S.C. §2412 to shift fees when the government has brought a frivolous case, id. at 101, which was the next area in which the Congress acted. Equal Access to Justice Act, Pub. Law No. 96-481 §204a, 94 Stat. 2327 (Oct. 21, 1980).

It recommended "[e]nactment of legislation permitting courts . . . to award attorneys' fees and expert fees," noting civil rights as an important area of concern and stressing that "[p]recisely this kind of remedial legislation is what is urgently needed at this time." House Hearings, supra, at 67, 126 (1975) (Statement of Charles R. Hobbs on behalf of the American Bar Association Special Committee on Public Interest Practice and Statement of Charles R. Halpern, Exec. Dir. Council for Public Interest Law).[8]

---

[8]While the report spoke of a statute that would apply to all public interest litigation, these witnesses observed that

> it makes sense to concentrate on those areas where the need is most dramatic. We concur with Father Drinan in his H.R. 9552, that the civil rights area is one where there is an urgent need for prompt legislation to permit attorneys' fee awards in cases to enforce the civil rights laws.

The manifest concern about expert witness fees was part of a broader concern for equalizing the resources of the parties in civil rights cases. In the Senate hearings, one witness characterized public interest litigation as a battle

> between David and Goliath. In this battle, however, Goliath holds the slingshot as well as the weight advantage...
>
> It is important, I believe, to emphasize here, that neither corporations nor the law firms that represent their interests need be the least bit defensive about leaving no stone unturned in putting forward their best possible case. Indeed, the adversary system, not to mention the canons of legal ethics, demands no less. The problem is that under present circumstances the corporation's citizen interest adversaries cannot devote anything approaching a comparable expenditure of resources to the development of their side of the case.

Senate Hearings, supra, at 841. The ABA

Id. at 125.

testified before the House subcommittee about:

> the need of the public to have both points of view properly represented. When the Government is involved, it is going to give a good run to its point of view. But too many cases have been decided by default, the failure to have a good presentation on the part of the other side.

House Hearings, supra, at 79 (Statement of Charles A. Hobbs, Member, Special Committee on Public Interest Practice of the American Bar Association). relative to the civil rights plaintiff, the

> opposition frequently has virtually unlimited resources, often including expert outside counsel. A federal, state, or even local agency defendant can draw upon the public treasury, and call upon full-time research assistants, the Federal Bureau of Investigation or state or local law enforcement investigators, and the myriad of support services which exist for the use of those agencies. Corporate litigants likewise often have vast resources, subsidized by tax deductions, with which to resist public interest claims. the result is that, especially in the larger public interest case, the sides become extremely unequal. This fact

> subverts the American system of justice, where two equal sides are expected to face one another in a vigorous adversary procedure ...

Id. at 89-90 (Statement of the Lawyers' Committee for Civil Rights Under Law). Congressman Danielson of California, a member of the subcommittee, put it graphically:

> [T]here ought to be a balancing of the power in our court. It seems to be fundamentally unfair that one party is the Government with also unlimited resources, funds, personnel, availability of records, availability of investigating personnel, and whatnot; on the other hand you have the private citizen. What was that thing twisting slowly in the wind? He is out there all alone anyway and it is chilly out there financially.

Id. at 61.

Compounding this problem is the fact that, in addition to their already greater resources, civil rights defendants were able to underwrite these extensive defenses with what is in fact public money. This is obvious in the

case of governmental defendants, who are paying litigation costs out of tax money -- including the taxes paid by plaintiffs and their families. In the case of corporations,

> public tax dollars are in a very real sense being used to support that litigation. The corporation's litigation expenses, its attorneys' fees, its court costs and all costs connected with the litigation are deductible from the corporation's income tax. and that is win or lose, frivolous or nonfrivolous, meritorious or nonmeritorious. So you really have a built-in beginning that one side that is litigating the kind of issues I am talking about is already being supported by public funds.

Id. at 835-36 (Flannery Testimony). Accord id. at 850 (Testimony of Joseph N. Onek, Director, Center for Law and Social Policy);[9] id. at 861 (Derfner Statement);

---

[9]Even fee shifting does not totally redress this imbalance, as he noted:

> Furthermore, the Government exercises no control over the expenses it will subsidize. If General Motors chooses to pay its

House Hearings, supra, at 161 (Onek Statement).[10]

It was this precise testimony that Congress heeded when it considered and passed § 1988.[11]

> lawyers $200 an hour the Government still pays one-half. If General Motors pays its lawyers to eat in the best restaurants and stay in the finest hotels, that is okay -- Uncle Sam is going to pay half of it, no questions asked. This is totally different from any kind of fee award system we might have. Under an attorneys' fee statute the courts would exercise control over attorneys' fees and other costs of litigation.

Id.

[10]Corporate civil rights violators can also pass on the costs of their legal defense to the consumer. Senate Hearings, supra, at 861 (Derfner Statement). See also House Hearings, supra at 861 (Testimony of Reuben B. Robertson, III, Public Citizens Litigation Group).

> [11] Representatives of the Lawyers Committee on Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing

It specifically implemented the policy of equalizing the resources of the parties when it adopted a different standard for fees to a prevailing defendant. See generally Christiansburg, supra; Hughes v. Rowe, 449 U.S. 5 (1980). Noting that defendants are usually governments, which "have substantial resources available to them through funds

---

> in the field testified to the devastating impact of the [Alyeska] case on litigation in the civil rights area .... The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.

H.R. Rep., supra, at 2-3, Legis. History 210-11. The Senate report acknowledged that this testimony "generally confirmed the record presented" at its hearings in 1973. S. Rep., supra, at 2, Legis. History 8.

in the common treasury," H.R.Rep., supra, at 7, Legis. History 215, Congress was concerned that: "Applying the same standard of recovery to such defendants would further widen the gap ... and would exacerbate the inequality of litigating strength." Id.

It is significant that §1988 was the legislative response to Alyeska because it was in the pre-Alyeska civil rights cases that expert witness fees were most consistently awarded.[12] It is well

---

[12] See, e.g., Fairley v. Patterson, 493 F. 2d 598, 606 n. 11 (5th Cir. 1974) (costs of preparing reapportionment plan in voting rights case); Welsch v. Likins, 67 F.R.D. 589 (D. Minn.) aff'd, 525 F.2d 987 (8th Cir. 1975) (§1983 suit on rights of mentally retarded); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part, rev'd in part, 516 F.2d 1251 (5th Cir. 1975) (employment discrimination suit under Title VII and §1981: attorneys' and expert witness fees awarded under both Title VII and "private attorney general" theory); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D.Cal. 1971); Bradley v. School Bd. of City of Richmond, 53 F.R.D.

established that a

> guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

Holy Trinity Church v. United States, 143 U.S. 457, 463 (1892). Here, the very event that precipitated the enactment of §1988, this Court's decision in Alyeska,

---

28 (E.D. Va. 1971) (school desegregation); Jones v. Wittenberg, 330 F. Supp. 707, 722 (N.D. Ohio 1971) (jail case); Jackson v. School Bd. of City of Lynchburg, Civ. Act. No. 534 (W.D. Va. April 28, 1970) (school case); Wright v. McMann, 321 Supp. 127 (N.D.N.Y. 1970) (prison case: unpublished decree). See also Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972) (award of attorneys and expert witness fees in voting rights case under "bad faith" exception). La Raza, which involved violations of environmental statutes, was cited by Senator Kennedy during the floor debates as an exalmple of a case "enforc[ing] the rights promised by Congress" that would be covered under S 1988. 122 Cong. Rec. 33314 (1976), cited in Maine v. Thiboutot, 448 U.S. 1, 10 n.9 (1980).

concerned the problem of expert witness fee costs. See discussion, supra, at 19-20 (Statement of Dennis Flannery); see cases cited supra, n. 5. The indivisibility of the attorneys' fees and expert witness fee problem was highlighted "in the testimony presented before the committees of Congress." Holy Trinity Church v. United States, 143 U.S. at 464. Thus, it cannot be assumed that Congress did not intend to include expert witness fees when it enacted §1988. In fact, it is clear from the congressional reports and legislative debates that such expenses were included.

III. CONGRESS SPECIFICALLY INCORPORATED THE PRE-EXISTING CASE LAW THAT INCLUDED EXPERT WITNESS FEES AS PART OF ATTORNEYS' FEES AND COSTS IN ENACTING SECTION 1988

The testimony before the House subcommittee set out the modus operandi that Congress in fact adopted in

restoring the recoverability of fees in civil rights cases.

> The bulk of the nonstatutory private attorney general cases in the past few years were cases under the Civil Rights Laws. These cases, as well as cases under specific attorneys' fee provisions of recent civil rights laws, provided Congress and the courts with a thorough education in attorneys' fees in this area, and resulted in a detailed body of law on technical questions. . . . There is thus a clear record to support the proposition that a generic provision governing the entire area should be superimposed upon the existing patchwork of specific provisions.
>
> One of the bills before this Subcommittee, H.R. 9552 . . . would allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits to enforce the civil rights acts which Congress has passed since 1866. This bill follows the language of section 402 of the Voting Rights Act, and of Titles II and VII of the 1964 Civil Rights Act. All of these acts depend heavily upon private enforcement, and fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate these important Congressional policies.

House Hearings, supra, at 85. (Lawyers'

Committee Testimony).

The committee reports and the legislative debates make clear that Congress used the precise language of Titles II and VII [13] and intentionally

---

[13] Because Congress adopted the language of earlier statutes, resort to the "plain meaning" of the words used in §1988 would be particularly inappropriate. See Cannon v. University of Chicago, 441 U.S. 754, 717 (1979), discussed, infra, at p.48.

> To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of the statute.

Thus, the fact that Congress did not expressly include expert witness fees, as it did in other statutes, is not controlling. Because Congress legislated in the context of the existing statutory scheme of attorneys' fees provisions, it had to adopt the precise wording of those statutes in order to incorporate the case law and standards developed under those provisions. This Court has on several occasions gone beyond the plain meaning of the statutory language to look to the legislative history of Civil Rights statutes, including §1988, in order to ascertain their correct publication.

Cannon, supra (implied cause of action under Title IX); Hughes v. Rowe, 449 U.S. 5 (1980); Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) (higher standard for award of fees to prevailing defendant).

This conclusion is also reenforced by the legislative history of a later statute which specifically provides for expert witness fees. In 1980, Congress passed the Equal Access to Justice Act, Pub. Law No. 96-481 §204(a), 94 Stat. 2327 (Oct. 21, 1980), amending 28 U.S.C. §2412. This statute provides for fee shifting in cases brought by the United States when its position is not reasonable in law or fact and specifically includes expert witness fees. It is more restrictive than §1988, placing a ceiling on hourly rates (absent special circumstances) and positing a higher standard for recovery of fees. In passing this statute, which was first discussed during the hearings and debates that led to the passage of §1988, n. 7, supra, Congress was aware of the interplay between §2412 and §1988. It specifically provided that, where both apply, the broader provisions of §1988 take precedence because "Congress has indicated a specific intent to encourage vigorous enforcement ...." H.R. Rep. No. 96-1418 at 18, [1980] U.S. Code Cong. & Ad. News 4997. Thus, Congress's explicit incorporation of expert fees in §2412 cannot be read to imply that the failure to include express language to that effect in §1988 indicates a contrary

adopted the prior case law under these statutes and the "private attorney general" theory as recommended at the hearings. As explicated in the Senate Report:

> S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3 (b) and §2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. §19731(e). . . . It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, 4 (1976). Legis. History 8, 10.[14]

---

intent. Rather, if Congress intended to include expert fees in the narrower statute -- which was designed merely to remove deterrents from contesting unreasonable litigation, then the broader --which was one designed to foster the vigorous assertion of fundamental rights -- cannot be read to exclude it.

[14] The importance of the committee report in establishing congressional intent is well established: "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and

Senator Kennedy, one of the sponsors of the bill, [15] further indicated that the bill "is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the Alyeska decision." Legis. History 23. Similarly, in the House, both Representatives Railsback and Bolling noted that the bill merely codified and restored the pre-Alyeska law. Legis. History 242, 247.

During the floor debate on the House

---

studying proposed legislation." Zuber v. Allen, 396 U.S.168, 186 (1969); Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25, 42 n. 7 (1986).

[15] In Schwegman Bros. v. Calvert Distillers Corp., 342 U.S. 384 (1951), this Court noted that: "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Id. at 394-95. Since Senator Kennedy's remarks as sponsor are wholly consistent with and complementary to the bulk of the legislative history, they possess added weight.

side, Congressman Drinan, the bill's sponsor and the author of the committee report, [16] amplified on the comments in that report. See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 5-6 (1976); Legis. History 213-214.

> The Civil Rights Attorney's Fee Awards Act of 1976, S.2278 (H.R. 15460) is intended to restore to the courts the authority to award reasonable counsel fees to the prevailing party in cases initiated under certain civil rights acts. The legislation is necessitated by the decision of the Supreme Court in Alyeska Pipeline Service Corp. against Wilderness Society, 421 U.S. 240 (1975). . . .
>
> Prior to the Alyeska decision, the lower Federal Courts had regularly awarded counsel fees to the prevailing party in a variety of cases instituted under the sections

---

[16] Mr. Drinan's exposition is especially authoritative since he was a member "of the House Judiciary Committee responsible for . . . [these] matters, author and chief sponsor of the measure under consideration, and a respected congressional leader in the whole area. . . ." Foti v. Immigration and Naturalization Service, 375 U.S. 217, 23 n. 8 (1963).

> of the United States Code covered by §2278....
>
> The Alyeska decision ended that practice, which this bill seeks to restore. . . .
>
> The language of S.2278 tracks the wording of attorney fee provision in other civil rights statutes such as correction 706 (k) of Title VII -- employment -- of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application. These evolving standards should provide sufficient guidance to the courts in construing this bill which uses the same term. I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation.

(Comments of Congressman Drinan; Legis. History 252-255 (emphasis added)).

Congressman Drinan's comments are particularly important for two reasons. First, they indicate the explicit intent of Congress in passing the Act to adopt the existing case law under Titles II and

VII. [17] More importantly, they indicate that, in restoring the pre-Alyeska practice Congress was conscious that expert witness fees and other out-of-pocket expenses had been recoverable even though they were not traditional "costs." See cases cited, supra, at n. 12. These non-statutory costs had been treated by the pre-Alyeska cases in just the way Congressman Drinan explained they would be handled under the Act:

> Costs not subsumed under federal statutory provisions normally granting such costs against the adverse party ... are to be included in the concept of attorneys' fees.

Fairley v. Patterson, supra, 493 F.2d at

---

[17] Congressman Anderson, one of the floor managers of the bill, also made this point at the opening of the floor debates. Legis. History 236.

606 n. 11.[18]

In 1976 when Congress debated and passed the Act, there was little doubt that expert witness fees had been recoverable under the "private attorney general" cases as discussed above and were recoverable under the attorneys' fees provision of Title VII on which the

---

[18] The incorporation of these non-statutory costs as part of "attorneys' fees" is particularly noteworthy in light of the confusion in the cases regarding the effect of 28 U.S.C. §§1920 and 1821 on the recoverability of expert witness fees. Compare Northcross v. Board of Ed., 611 F.2d 624, 642 (6th Cir. 1979) (recoverable under §1920); Keyes v. School District No. 1, Denver Colo., 439 F. Supp. 393, 417-18 (D. Colo. 1977) (same); with Neely v. General Electric, 90 F.R.D. 627 (N.D. Ga. 1981) (not recoverable under §1920); with Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc) (recoverable under §1988); O'Bryan v. Saginaw Mich., No. 79-1297 (6th Cir. Jan. 6, 1981) (same); McPherson v. School District #186, 465 F. Supp. 749, 763 (S.D. Ill. 1978) (same); with Loewen v. Turnipseed, 505 F. Supp. 512, 519 (N.D. Miss. 1981) (recoverable, but theory under which awarded is unclear).

Act was modeled.[19] Indeed, the award of expert witness fees to the prevailing party in Title VII litigation was so well established that it often went unchalleged. Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 at p.5048 ("These charges were not challenged by defendants and are valid"). In innumerable cases, the lower courts had awarded such fees without discussion. See, e.g., Albemarle Paper Co. v. Moody,

---

[19] EEOC v. Datapoint, 412 F. Supp. 406, 409 (W.D. Tex. 1976), vacated and rem'd on other grounds, 570 F. 2d 1264 (5th Cir. 1978); Rios v. Enterprise Steamfitters Local, 400 F. Supp. 993, 997 (S.D.N.Y. 1975), aff'd, 542 F. 2d 579 (2d Cir. 1976); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part, rev'd in part on other grounds, 516 F. 2d 1251 (5th Cir. 1975) (After the passage of the Act, Sabala was reversed by this Court on other grounds. 431 U.S. 951 (1977)). See also Sledge v. J.P. Stevens, 12 E.P.D. ¶11,047 (E.D.N.C. 1976) (prospective award of fees for plaintiffs' expert necessitated by defendants' computerized records).

444 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971).[20]

The Senate left little doubt about the case law it intended to incorporate.

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D.Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte Mecklenberg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep. No. 94-1101, supra, at 6; Legis. History 12. These cases were carefully chosen to include both statutory -- Davis

---

[20] Research reveals no reported pre-1976 Title VII cases in which expert witness fees were discussed and disallowed. For post-Act decisions compare Wheeler v. Durham City Bd. of Ed., 585 F.2d 618 (4th Cir. 1978), with Northcross v. Bd. of Ed. of Memphis, 611 F.2d 624 (6th cir. 1979).

and Swann, supra, -- and non-statutory "private attorney general" -- Stanford Daily, supra, -- fee awards and to include a broad range of attorneys' fee issues: fee computation standards, hourly rates, bonus awards for the continuation of the litigation or excellence of results, expert witness fees, paralegal and out-of-pocket expenses.[21] Davis, in fact, is one of the pre-Act Title VII fee awards which specifically included expert witness fees. And in Swann, more than a third of the $29,972.33 in costs awarded by the district court constituted expert witness fees and expenses.[22]

---

[21]This Court has repeatedly noted Congress' citation to these three cases and has relied on them in interpreting the Fees Act. City of Riverside v. Rivera, 477 U.S. ___, 91 L.Ed.2d 466, 480 (1986); Blum v. Stenson, 465 U.S. 886, 893-894 (1984); Hensley v. Eckerhart, 461 U.S. 424, 430-431 (1983).

[22] Amicus NAACP Legal Defense Fund was of counsel in Swann.

Thus, there can be little doubt that Congress acted deliberately and intentionally to incorporate an existing body of case law which clearly allowed for the inclusion of expert witness fees and all manner of reasonable out-of-pocket expenses[23] as part of "fees and costs." [24]

---

[23] As phrased by a supporter, Congressman Seiberling: "All we are trying to do in this bill is . . . to get compensation for their legal expenses in meritorious cases." Id. at 245.

[24] Because the legislative history makes clear that expert witness fees, like all other out-of-pocket expenses, are ordinarily recoverable, it would be contrary to the legislative purpose to require a higher standard for the recovery of these expenses. Some of the lower court opinions have been read to require that expert testimony be "vital," "essential," or "helpful and important." See Northcross v. Bd. of Ed., 611 F.2d 624, 642 (6th Cir. 1979); Ste. Marie v. Eastern Railroad Association, 497 F.Supp. 800, 813-14 (S.D.N.Y. 1980), rev'd on other grounds, 650 F.2d 395 (2d Cir. 1981); Keyes v. School District, 439 F.Supp. 393, 418 (D. Colo. 1977). Amicus does not agree with such a reading of these cases. These expenses must

In summary:

> The provision for counsel fees in §1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964....

Hanrahan v. Hampton, 446 U.S. 754, 758 n. 4 (1980).

> The drafters ... explicitly assumed that it would be interpreted and applied as [these provisions] had been during the preceeding twelve years.... It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to [these provisions and the case law], we are especially justified in presuming both that those representatives were aware of the prior interpretation ... and that that interpretation reflects their intent.

Cannon v. University of Chicago, 441 U.S.

---

ordinarily be included under §1988, which was intended to encourage vigorous and effective pursuit of one's civil rights, see Pt. IV, infra. Of course, courts always retain the power to disallow an expert expense, or any other, if it is not "reasonable."

677, 696-97 (1979).

IV. TO EXCLUDE EXPERT WITNESS FEES FROM THE PURVIEW OF SECTION 1988 WOULD SUBVERT THE VERY PURPOSE OF THE ACT BY MAKING IT EFFECTIVELY IMPOSSIBLE FOR CIVIL RIGHTS PLAINTIFFS TO BRING MERITORIOUS CLAIMS THAT INVOLVED COMPLEX OR TECHNICAL MATTERS, CONTRARY TO CONGRESS' INTENT

The real issue in this case is what Congress intended in the civil rights fee acts. Thus, whatever standards apply under F.R.C.P. 54(d), §§ 1920 and 1821--including prior approval by the trial judge or findings that the expert testimony was "necessary or helpful ... or indispensable," see Copper Liquor, Inc., v. Adolph Corrs, Co., 684 F.2d 1087, 1100 (5th Cir. 1982) -- they relate not at all to the standards and policies that control decision under § 1988 and Title VII. Congress was concerned with encouraging good faith civil rights litigants to bring suit. Congress was concerned with equalizing the legal

resources available to the parties. Accordingly, it both adopted the prior case law including expert witness fees as recompensable expenses and imposed a stringent standard before these expensive items could be shifted to the unsuccessful plaintiff.

Congress was clear about its purpose in passing the Act: It was "designed to give such persons effective access to the judicial process...." H. Rep. No. 94-1558 at 1; Legis. History 209. As stated by Senator Kennedy: "Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws." Legis. History 197. An important consideration was to provide "fees which are adequate to attract competent counsel...." S. Rep. No. 94-1011 at 6, Legis. History 12; H. Rep. No. 94-1558 at

9; Legis. History 217. The bill's sponsor echoed the testimony given in the House, cited supra, at 22, n. 6:

> When Congress calls upon citizens -- either explicitly or by construction of its statutes -- to go to court to vindicate its policies and benefit the entire Nation, Congress must also insure that they have the means to go to court, and to be effective once they get there.... We cannot hope for vigorous enforcement ofour civil rights laws unless we, in the words of the Knight [v. Auciello] court, "remove the burden from the shoulders of the plaintiff seeking to vindicate the public right." That is what this bill does, and why it is so vital.

Legis. History 200 (Remarks of Senator Tunney).

If expert witness fees had not been included in the fee shifting scheme of the Act, it would have failed in its fundamental purpose to encourage and make effective civil rights litigation. Without the protection of the Christiansburg standard, good faith

plaintiffs would be deterred by the spectre of having to shoulder their opponents' often large expert witness fees. On the affirmative side, civil rights plaintiffs would be deterred because they could not hope to finance the successful presentation of their cases. This would hardly "facilitate and encourage the bringing of actions," particularly in the "typical case," where plaintiffs are indigent and "there is no damage claim from which" to subsidize costs. Legis. History 3 (Remarks of Senator Tunney in introducing the bill). As one witness admonished the House subcommittee, costs "such as expert witness fees and travel expenses", must be included lest

> the very point of the bills ... be defeated for cases in which typical though nontaxabale litigation costs are likely to be heavy, and the plaintiff has no prospect of financing them absent a reasonable

> hope of recovering them from the defendant.

House Hearings, supra, at 136 (Statement of John M. Ferren).

It might be that, if expert witness fees were not recoverable, the necessary experts simply would not be hired. But this would defeat the congressional purpose to provide for effective access to the courts. This was the very point of the witnesses who testified before Congress about the necessity of providing for the recovery of expert witness fees. See supra, Pt. II. In echoing their concern for providing for effective access, Congress should not be presumed to have discarded the substance of that concern.

Finally, there exists a third possible result of not including expert witness fees: that these items of expense would be borne by the attorneys

themselves. But this could not be what Congress intended, for Congress knew that attorneys had been unable to litigate meritorious issues because of their inability to meet these expenses. See Statement of Dennis Flannery discussed, supra, at 19 - 20. Moreover, to expect attorneys to pay these often significant expenses out of the fees awarded would interfere with another of Congress's specific objectives: to provide fees sufficiently high to motivate capable counsel to accept civil rights cases.[25]

---

[25]Private attorneys would face two problems. First, the expenses could equal or even exceed any attorney's fee that might be awarded. Indeed, most practitioners would probably prefer not being paid for their time rather than not being reimbursed for out-of-pocket expenses. Second, the advancing of costs without any obligation on the part of the clients to reimburse, would run afoul of ethical rules against maintenance of litigation. See ABA Code of Professional Responsibility, DR 5-103(B). Although the application of such rules to civil rights cases is of doubtful legality (see

Congress was aware that civil rights lawyers were not receiving copious awards under the other fee provisions.[26] These

---

NAACP v. Button, 371 U.S. 415, 420 (1963)), the very real threat of a disciplinary proceeding (see, e.g., In re Primus, 436 U.S. 412 (1978)) would be a strong deterrent.

[26] As observed by Senator Kennedy during the debates:

> The Senator from Alabama cannot name one lawyer in this country who has become wealthy because of his work on the protection of the civil rights of this Nation. I ask him to name one -- and his silence in this particular situation, I think, responds full well.
>
> We are not talking about the kinds of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting the civil rights of citizens whether they are in my own city of Boston or in Birmingham.

Legis. History 92. Senator Tunney amplified on this point:

> In fact, a 1975 study undertaken by Leslie Helfman of the Antioch Law School indicates that of the 140 most recent cases decided prior to Alyeska, civil rights cases ranked near the bottom with fees averaging

fees are intended to parallel market rates in an effort to attract counsel. Blum v. Stenson, 465 U.S. 886 (1984). If they were discounted by the cost of expert witnesses, they would no longer be competitive with fees available in commercial and other non-civil rights litigation.

It is important to recognize, as did Congress when it passed the Act, that even with fee shifting the economics of civil rights cases are substantially different than most other areas of practice. Ordinarily, there are no large damage awards from which the client can cover litigation expenses such as expert witness fees. See city of Riverside v. Rivera, 477 U.S. _____, 91 L.Ed. 466

> $37 per hour compared to $181 per hour for the highest ranking field of antitrust law.

Id. at 138.

(1986). Many civil rights cases seek injunctive relief only. Sen. Rep. at 6. Legis. History 12. This is in sharp contrast to cases taken for a contingent fee. In personal injury cases and most treble damage antitrust cases, the damage awards are often large enough for the attorney to pay for large expense items such as experts and still retain a reasonable fee. See Legis. History 200-201 (Remarks of Senator Kennedy). In ordinary commercial cases the fee is based on an hourly rate and the client is billed for expenses such as expert witness fees.

The significance of the expert witness fee issue to the purposes of the Act cannot he overstated: This case will have a significant impact on the entire range of civil rights litigation. And as the decisions of this Court and of the

lower courts demonstrate, civil rights cases often involve complex issues of law and fact.[27] For example, an issue of discrimination in jury selection or some other area might require a statistical expert. See Castaneda v. Partida, 430 U.S. 482 (1977) and Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 606 (1986). Voting rights cases require an array of expert testimony covering a variety of matters. Thornburg v. Gingles, 478 U.S. __, 92 L.Ed.2d 25, 48 (1986) ("The investigation conducted by the District

---

[27] As this Court has noted, the civil rights statutes and the amendments on which they are based "prohibit sophisticated as well as simple-minded modes of discrimination." Lane v. Walker, 307 U.S. 268, 175 (1969). Cases often require sophisticated proof for "[i]n an age when it is unfashionable . . . to openly express racial hostility, direct evidence of overt bigotry will be impossible to find." United States v. Bd. of School Comm'rs, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978).

Court into the question of racial bloc voting ... relied principally on statistical evidence presented by [plaintiffs'] expert witnessess ....". And indeed, such testimony is essential to prove the necessary elements of a vote dilution case. Id. at 45-46. School cases often require expert testimony. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 9-10 (1971); Bradley, supra, 53 F.R.D. at 44 ("It is difficult to imagine a more necessary item of proof...."). A Title VI case challenging race discrimination in a hospital system that receives federal funds could not be presented effectively without calling a specialist in health planning. See Bryan v. Koch, 627 F.2d 612, 617-618 (2d Cir. 1980). A prisoner could not establish deliberate indifference in the maintenance of an inadequate health care

system without being able to present testimony of doctors and medical care delivery specialists. See Estelle v. Gamble, 429 U.S. 97 (1976); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974). Expert witness testimony may be crucial to establish that the conduct of police officers deviates from accepted norms. Tennessee v. Garner, 471 U.S. ___, 85 L.Ed.2d 1, 14 (1985).

Cases under Title VII indicate the importance of expert testimony to the workings of that Act. It would be difficult for most plaintiffs to challenge a discriminatory employment test under Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), without the aid of an expert in test validation. Employment cases may present unusual issues of job relatedness requiring all manner of witnesses expert in the underlying

substance of the job. See Baker v. City of Detroit, 483 F. Supp. 919, 994-1000 (E.D. Mich. 1979). Even the ordinary class action employment discrimination case, whether under Title VII or 42 U.S.C. §1981, can rarely be brought without the use of a statistician. See Bazemore v. Friday, 478 U.S. _____, 92 L.Ed.2d 315, 329-31 (1986); Thornberry v. Delta Air Lines, 25 E.P.D. ¶31,496 (N.D.Cal. 1980); [28] Ste. Marie v. Eastern

---

[28] In Thornberry, supra, the court noted that:

> [I]n the present case, as in much of today's Title VII litigation, the alleged discriminatory practices were not overt or de jure but if proved, would consist of subtle company policies.... In order to prove their prima facie case, and in particular, to rebut defendant's ... defense, plaintiffs' statistical case as developed through the use of computer experts would have been essential.

25 E.P.D. at 18, 990-996.

Railroad Assoc., 497 F. Supp. 800, 813-14 (S.D.N.Y. 1980) (personnel and statistical experts "essential"), rev'd on other grounds, 650 F.2d 395 (2d Cir. 1981); Bachman v. Pertschuk, 19 E.P.D. ¶9044 at 6508 (D.D.C. 1979) ("preparation of this case surely required such [statistical] analysis.").

CONCLUSION

The position of the en banc Fifth Circuit, erroneously eliding expert witness fees from the coverage of the Act, must be repudiated. It is contrary to the clearly expressed intent of Congress. It would have a devastating impact on the whole range of civil rights litigation. It would defeat the very purposes of the Act: To enable citizens to afford to vindicate their statutory and constitutional civil rights, to enable them to do so effectively, and to

attract competent counsel to the task.

The judgment of the court below should be affirmed, but for the reasons that Congress expressed when it passed the Act.

Respectfully submitted,

STEVEN L. WINTER
University of Miami
School of Law
P.O. Box 248087
Coral Gables, Fla. 33124

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, N.Y. 10013
(212) 219-1900

JAMES ROBERTSON
HAROLD R. TYLER, JR.
Co-Chairmen
NORMAN REDLICH, Trustee
WILLIAM L. ROBINSON
RICHARD T. SEYMOUR
Lawyers' Committee for
Civil Rights Under Law
1400 'Eye' Street, N.W.
Washington, D.C. 20005

JOHN A. POWELL
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036

ANTONIA HERNANDEZ
E. RICHARD LARSON
Mexican American Legal
Defense & Educational
Fund
634 South Spring Street
Los Angeles, CA 90014

Attorneys for Amici Curiae

*Counsel of Record